(20,250)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 291.

JAMES E. KENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF PORTO RICO.

IN ERROR TO THE SUPREME COURT OF PORTO RICO.

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1 In the Supreme Court of Porto Rico.

No. 46.

PEOPLE OF PORTO RICO, Respondent,
vs.
JAMES E. KENT, Appellant.

To the Secretary of the Supreme Court of Porto Rico:

You are requested to take a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to wit:

Presentation of information in the District Court of San Juan;
The information;
The arraignment;
The plea of Defendant;
The Verdict of the Jury;
The judgment of the District Court of San Juan;
Charge of the Court to the Jury;
Sentence of the District Court of San Juan;
The Bill of Exceptions;
Statement as to condition of defendant;
Notice of Appeal from the Judgment of the District Court of San Juan;
Letter of Secretary of the District Court to the Secretary of the Supreme Court.
Application of counsel to be considered as attorney for the defendant;
Application of defendant for time to draw up writing of appeal;

2 Order granting foregoing application;
Application of defendant for an order requiring certain documents to be certified by the District Court of San Juan;
Order of Chief Justice granting defendant's request;
Letter of District Judge to Chief Justice of the Supreme Court of Porto Rico;
Certificate of the Secretary of the District Court of San Juan of documents No-. 1, 2, 3, 4, and 5;
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Opinion of the Supreme Court of Porto Rico;
Judgment of the Supreme Court of Porto Rico;
Concurrent opinion of Mr. Justice Wolf;
Delivery of opinion and judgment to Secretary of the District Court;
Notice of appeal to the Supreme Court of the United States;
Order allowing appeal, and fixing amount of bond;
Bond.

Respectfully,

——— ———,
Attorney for Appellant.

3 ISLAND OF PORTO RICO,
Judicial District of San Juan:

In the term of the District Court of the judicial district of San Juan, Porto Rico, which commenced on Monday the first day of August 1904, in which the Honorable Emilio del Toro, Judge of the said Court presided at the trial of the following cause, to wit:

No. 822.

THE PEOPLE OF PORTO RICO
vs.
J. E. KENT.

Embezzlement.

Presentation of Information.

On the 23rd of May, 1904, the information was duly filed in this case.

Information.

In the name and by the authority of the people of Porto Rico:

THE PEOPLE OF PORTO RICO
vs.
J. E. KENT.

In the District Court of San Juan, on the 23rd day of the month of May, 1904, the prosecuting attorney presents this information against J. E. Kent, a prisoner in the San Juan jail, for the crime of embezzlement, under section No. 448 of the Penal Code, committed in the following manner:

B. R. Dix, on about the 9th day of May, 1904, was Treasurer of the Union Club, an organization established in the ward of Santurce of this city, for the recreation of its members. That on or about the aforesaid date the said Mr. Dix as such treasurer, confided
4 to the accused, J. E. Kent, the charge of keeping the accounts and books of that office, authorizing him also to collect the money which should be received in the treasury of said society, with the duty of delivering the said money to the treasurer, the said money belonging to the club; that on or about the date above mentioned the said accused, J. R. Kent, in the judicial district of San Juan, Island of Porto Rico, illegally and fraudulently took and applied and appropriated to his own benefit the sum of one thousand eight hundred and ninety-six ($1896.77) dollars and seventy-seven cents, which money belonged to the said Club, and had been collected from the members and other persons under the authority that had been conferred by Dix; this act being contrary to the law for such case provided, and against the peace and dignity of the People of Porto Rico.

(Signed) JESUS M. ROSSY,
District Attorney.

The foregoing information is based on the testimony of witnesses examined by me under oath, and I solemnly believe that there is just cause for presenting the same to this court.

(Signed) JESUS M. ROSSY,
District Attorney.

Sworn to and signed before me this 23rd day of May, 1904.

(Signed) LUIS MENDEZ VAZ,
Secretary of the Court.

Witnesses:
B. R. DIX.
L. D. HARRY.
A. A. SMITH.
H. B. MACCORMICK.
W. C. HYLAN.

The accused is notified of his right to a trial by jury.

Arraignment.

On the 23rd of May, 1904, the accused, J. E. Kent appeared and the information was duly read to him. He asked for time to answer the same through counsel and he was granted until the 28th of May at nine o'clock a. m.

Plea of Defendant.

On the 28th day of May, 1904, the accused appeared and through counsel, José C. Ramos, entered his plea of not guilty.

Verdict.

No. 822.

THE PEOPLE OF PORTO RICO
vs.
J. E. KENT.

We, the members of the jury consider J. E. Kent guilty of the crime of embezzlement with which he is charged.

San Juan, Porto Rico, 14th of September, 1904.

Foreman, JUAN APELLANIZ.

Judgment.

No. 822.

THE PEOPLE OF PORTO RICO
vs.
J. E. KENT.

Embezzlement. Judgment.

On the 10th of the present month of September this case came on for trial and the same was continued on the 12th, 13th and 14th of

the said month of September 1904, and the People of Porto Rico appeared by its prosecuting attorney and the accused, J. E. Kent, appeared in person and by his attorneys, and both parties announced in open court that they were ready for trial, the said parties having so appeared in all the sessions of the court in this case. Immediately after this cause was called for trial, a jury of twelve men was empaneled, that is to say, Juan Apellaniz and eleven others, who had been duly selected and cited to act as such jurors and after said jurors having been duly sworn to render their verdict in this case in accordance with the law, the trial of this case was proceeded with; and the jury, after hearing the information filed against the accused and the answer of the said accused, pleading not guilty, and after having heard the evidence of the prosecution and of the defence, and the arguments of counsel, and the charge of the court to the jury on questions of law, they withdrew to deliberate on their verdict, and later they returned to the court room and through
6 their foreman pronounced in open court the accused being present in person, the following verdict:

No. 822.

THE PEOPLE OF PORTO RICO
vs.
J. E. KENT.

We the members of the jury find J. E. Kent guilty of the crime of embezzlement with which he is charged.

San Juan, Porto Rico, 14th of September, 1904.

Foreman, JUAN APELLANIZ.

In view of the verdict of the jury the court this 14th day of September 1904 should declare and does declare the accused, J. E. Kent, guilty of the crime of embezzlement and sets the 17th day of September 1904, as the date on which sentence will be pronounced.

EMILIO DEL TORO.
Judge of the District Court of San Juan.
LUIS MENDEZ VAZ, *Secretary.*

Statement of Facts.

The parties in this case have not presented a statement of facts.

Charge of the Court to the Jury.

GENTLEMEN OF THE JURY: The moment has arrived at which, in accordance with the law, the case is to be submitted to your deliberation and decision. And also in accordance with the law, the judge will make a brief statement of all the facts brought out in this proceeding.

The prosecuting attorney of this District Court filed his informa-

tion against J. E. Kent, charging him with the crime of embezzlement. In view of the fact that the accusation was denied after several incidents which arose and were decided, the trial of this case was begun in accordance with the wishes of the accused, before a jury. The case was duly presented by the prosecuting attorney, and his evidence was introduced. Later the evidence of counsel for the accused was presented, and the case has been fully argued by both sides.

7 Kent is accused of having appropriated or taken, or of having employed for his own use moneys which belonged to the Union Club, in the person of its treasurer, Mr. B. R. Dix. The prosecuting attorney, has brought here before you as evidence, witnesses, documents and books. You have heard the testimony of all the witnesses for the prosecution and it now devolves upon you only to determine the value of that testimony. The books which have been presented as evidence will be delivered to you, and you may examine those books and determine whether or not what has been testified to here by the witnesses appears therefrom, and finally you will examine the written confession of the accused, and place upon it the value which it should have in evidence.

In regard to the admission of this document, you will remember that an incident occurred in this Court. At the time that document was about to be offered in evidence by the prosecuting attorney, thet defence requested that a preliminary investigation be made, not in the presence of the jury, in order to see whether that document should or should not be admitted; and the court acknowledging the rights of the accused, granted the said request, and the investigation was made; and the judge, in view of the result of thainvestigation, considered the said document admissible in evidencet and when you were again called in to occupy your places, in open, court, you were told that that document had been admitted in evidence. At that time one of the sessions of the court was closed, and the evidence of the prosecution was all in.

Then came the evidence produced by the defence, and another incident arose in regard to this document.

8 The counsel who had requested that an investigation be made out of the presence of the jury, then requested that the testimony given in that investigation be placed before the jury, which request was denied by the court, in compliance with a provision of the law which forbids the delivery to the jury of written testimony; and then counsel requested that the testimony be again given, in your presence, and the testimony was so given in your presence. So that you are in a position with respect to conscience and understanding to give to that confession, considering the testimony produced by the defence, the value which it ought to have.

The court has thought that this document should be submitted to your consideration, and that document is submitted to you, and you will place upon it its proper value, as you have been heretofore charged, taking into consideration all the evidence produced in regard to it.

Neither one of the parties has asked, and especially not the de-

fence, that you be given special instructions on any particular provision of the law. It is my duty to give you the law applicable to the case.

Section 445 of the Penal Code in force in Porto Rico is as follows:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted."

Section 448 of that Code says:

"Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

This is the law applicable to the present case.

9 Counsel for the defence has raised the question that the Spanish version does not correspond exactly to the English version. In the English text of section 445 the word *embezzlement* is used, which is translated in the Spanish code as *abuso de confianza* (abuse of confidence). On page 215 in the second column of the Diccionario Ingles-Español y Español-Ingles by J. M. Lopez and E. R. Bensley, the word *embezzlement* is translated as "Hurto, robo, el acto de ocultar á hurtadillas alguna cosa puesta al cuidado de uno con intención de apropiarsela" (theft, robbery, the act of taking by stealth anything placed in the keeping of a person, with the intention of appropriating the same), and the word *embezzler* is translated as "*malversador autor de un abuso de confianza*" (one who misapplies property, author of an abuse of confidence) and other peculiar definitions. And in a dictionary all in English which we shall translate with the assistance of the interpreter of this court; that is to say the "Standard Dictionary of the English Language," published by Funk & Wagnalls Company, New York and London, 1900, we find on page 590, in the second column, in defining the word *embezzlement*, the following: "To appropriate or apply fraudulently to one's own benefit moneys or merchandise which has been officially or privately placed in his custody."

We think, then, that there is no question whatever on the part of the court; we submit to you the law just as it appears in the Spanish edition of our code, which is certified to be a true and exact (copy) by the Secretary of Porto Rico, together with the foregoing explanations.

Counsel for the defence has also cited section 270 of the Code of Criminal Procedure, and it is my duty to call your attention thereto.

That section says:

10 "Upon a trial for larceny or embezzlement of money, bank-notes, certificates of stock, or valuable securities, the allegation of the information, so far as regards the description of the property, is sustained, if the offender be proved to have embezzled or stolen any money, bank-notes, certificates of stock, or valuable security, although the particular species of coin or other money, or the number, denomination, or kind of bank-notes, certificates of

stock or valuable security, be not proved; and upon a trial for embezzlement, if the offender be proved to have embezzled any piece of coin or other money, any bank-note, certificate of stock, or valuable security, although such piece of coin or other money, or such bank-note, certificate of stock or valuable security, may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly."

So that it is not necessary to prove, in a case of embezzlement, to which section 270 refers, all of the circumstances, even the most essential circumstances, but the allegations contained in the information will be sustained, if it be proved that something has been embezzled, without expressing the kind of money.

It is a duty which we cannot elude, and to which attention was called by one of the counsel for the defence, at the beginning of his argument, to explain to you that when a reasonable doubt exists the accused must be discharged. The provision is certainly contained in section 236 of the Code of Criminal Procedure, and I must explain to you that in truth the defendant must be discharged when doubt exists, but it must be, according to the words of the statute, a reasonable doubt; not the doubt that might arise in a weak mind, but the doubt that might arise in the ordinary mind; not the doubt that might arise from mere fiction, but the doubt based on certain facts, and in such a sense you should follow the allegations of the defence.

The court believes that you have understood the case per-
11 fectly. You are men who are not acting for the first time as jurors. The evidence in this case has been presented very fully and in both languages. One witness has been submitted to the examination of the parties for nearly nine hours. If you conscientiously believe that from the evidence you can deduce that Mr. B. R. Dix, a citizen of the United States, resident in Porto Rico, was appointed Treasurer of the Union Club, a society in San Juan, Porto Rico; that the accused, James E. Kent, was appointed Secretary of the same institution; that the treasurer, Mr. B. R. Dix, having confidence in the said Kent, who had been appointed secretary of the same institution, conferred upon him the authority to keep the books of the treasury, to receive the moneys due to the said treasury, and, that abusing the confidence so reposed in him, the said James E. Kent appropriated for his own benefit or use, in any way, or employed without rendering account to and against the interests of B. R. Dix, an amount greater than fifty dollars, then, in accordance with the law, and if you believe that that is true from the evidence presented, from the testimony of the witnesses, from those books, from those documents, from that confession, you should render a verdict of guilty. If, on the other hand, you believe the accused has not appropriated such money; that the accused did not commit such acts; if you reach the conclusion from the evidence of the defence or from an examination of any of the evidence, that he has not committed any act whatever, if you should believe that, you should render your verdict declaring him innocent.

Moreover, if for well founded and certain facts, if upon thinking dispassionately, in your moral conditions, you believe that a
12 reasonable well founded doubt exists, not a vague doubt, then you should render a verdict declaring the accused innocent.

The case is submitted to your consideration, and the court has every confidence that you will render your verdict in accordance with the dictates of your conscience and the evidence introduced.

Sentence.

No. 822.

THE PEOPLE OF PORTO RICO
v.
JAMES E. KENT.

Embezzlement. Sentence.

This 17th day of September, 1904, the convict, James E. Kent, appeared to receive his sentence, and the said convict not having given sufficient reasons to prevent the pronouncement of the sentence in this case, the court pronounces the same in the following terms:

The accused, James E. Kent, having been duly tried by a jury and declared guilty by the same on the 14th day of September 1904, of the crime of embezzlement, with which he was charged by the prosecuting attorney, the court in compliance with the judgment of the 14th of September 1904, must condemn and does condemn the said James E. Kent to the punishment of three years' imprisonment at hard labor in the Departmental Penitentiary of Porto Rico, in San Juan, and to the costs, and it is hereby ordered that the condemned man be taken from this Court to the Departmental Penitentiary of Porto Rico in San Juan, and there to be delivered to the Warden of said institution in order that he may be therein confined for the term of three years beginning on this date, at hard labor.

EMILIO DEL TORO,
Judge of the District Court of San Juan.

LUIS MENDEZ VAZ, *Secretary.*

Bill of Exceptions.

In the District Court for the Judicial District of San Juan.

13 THE PEOPLE OF PORTO RICO, Plaintiff-,
vs.
JAMES E. KENT, Defendant.

Defendant's Bill of Exceptions.

Be it remembered that at the August term of the San Juan District Court, within and for the District of San Juan, on the 16th day of August 1904, present the Honorable Emilio del Toro, Judge, the

defendant in this case through his counsel made the following motion:

"In the San Juan District Court.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT, Defendant.

Now comes James E. Kent, the defendant herein, by his attorneys Ramón Falcón and Joseph Anderson Jr. and move this Honorable Court that he be allowed to withdraw his plea heretofore filed of "not guilty," and in place thereof substitute a demurrer to the information.

Defendant states that at the time of making said plea he had not been sufficiently informed of his privileges in the matter; was not represented by counsel with whom he had advised and that he has been informed and believes that he has a good ground for demurrer in the premises: that unless he demurs he will not be sufficiently informed of the issue he has to meet.

JAMES E. KENT,
By one of his attorneys, JOSEPH ANDERSON, JR.

This is to certify that I have examined carefully the information filed herein: that I do not believe the same is good in law and that the defendant should be allowed to demur thereto.

JOSEPH ANDERSON, JR.

SAN JUAN, *August 13th*, 1904.

Copy received by me.

LOUIS CAMPILLO,
Prosecuting Attorney."

Defendant's Demurrer.

Now comes the defendant herein James E. Kent, by his attorneys Joseph Anderson, Jr. and Ramon Falcon, and demurs to the information filed herein and for cause of demurrer says:

1. That the information is bad in that it does not conform to the requirements of Section 153 of the Code of Criminal Procedure, in that it does not contain a statement of the acts constituting the offence in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended.

2. That it does not conform to section 73 of the said Code inasmuch as the facts stated in the information do not constitute the offence of embezzlement.

3. That it does not conform to section 153 of the said Code inasmuch as there is an attempt to charge more than one offence, to wit:—

In the first paragraph thereof the Defendant is charged with the crime of embezzlement.

And in the last part of the information there is an attempt to charge the defendant with the crime of larceny.

4. That it contains matter, which, if true, would constitute a legal justification or excuse of the offence charged, and because the facts as stated do not in themselves constitute an offence contrary to paragraph 4 of the said Section 153.

Wherefore the defendant prays judgment and that this action against him be dismissed."

(Signed :) JOSEPH ANDERSON, JR.

SAN JUAN, P. R., *August 15th*, 1904.

Received copy of the above.

LUIS CAMPILLO,
Prosecuting Attorney.

Which motion the court decided as follows:

We have duly considered the motion of the defendant made in this case asking leave to withdraw his plea of "not guilty" and substitute the same by a demurrer to the information.

In this case the prosecuting attorney filed the information, duly sworn to on the 23rd of May 1904. The said information was read to the accused in open court on the same date and the de-
15 fendant asked for time to answer the same through counsel, and the court granted five days for that purpose, at the expiration of which time the defendant appeared before the court accompanied by counsel and pleaded "not guilty." This occurred on the 28th of May 1904.

On the 21st of July, 1904, the case was set for hearing on the second of August, on which date the same was continued until the 18th of the present month, that is to say, tomorrow. The attorney who made the motion under consideration has been the counsel of record since the first of August, 1904.

The code of criminal procedure of Porto Rico expressly states the proper time for the defendant to plead. At such time the defendant entered his plea in this case of "not guilty." Thereafter the proceedings in this case continued in accordance with the provisions of said Code, and this is the second time that the case has been set for hearing. Therefore the law does not authorize, at this time, the withdrawal of any plea entered at the proper time and the substitution of new pleadings. This opinion is based on the logical construction of our Code of Criminal Procedure and in accordance with the text-writer Bishop, who, on page 123 of the first volume of his works on criminal procedure, states:

"Ordinarily under a rule of law or of a court, a demurrer should be made at a stated period of the case. If at that time the party should fail to make use of his right, or if said party should take a step ahead, in place of that, his right to file his demurrer must be understood to have been waived."

So that the law is clearly against the granting of the motion.

Considering that this matter is subject to the discretion of the court we should decide against the motion for that reason. If we believed that the rights of the accused were being prejudiced greatly, if
16 we believed that he had been the victim of his ignorance and of the negligence of his counsel, then we would grant the motion. But in our opinion such has not been the case. He has always been represented by counsel. He received the benefit of five days to file his answer to the information. He made a plea that can never prejudice his rights, because in accordance with section 165 of the Code of Criminal Procedure. The denial includes all of the essential allegations contained in the information, and moreover, tomorrow, he will have an opportunity to defend himself in a simple trial.

We should, therefore, under any aspect of the case, deny the motion.

EMILIO DEL TORO, *Judge.*

August 17th, 1904.

To which ruling of the court the defendant duly excepted.

2. Thereupon, upon a continued hearing of said case on the 18th day of August, 1904, defendant by his counsel moved the court to quash the information with the following motion to wit:

"Now comes the defendant herein, James E. Kent, by his attorneys, Joseph Anderson, Jr., and Ramon Falcon, and moves this Honorable Court that the information heretofore filed in said case be quashed, and in support of said motion defendant says:

1. That the information is bad both in form and in substance.
2. That it does not conform to the requirements of the Code of Criminal Procedure and especially to the requirements of Section 153 of said Code.
3. That the offence which it is attempted to charge is not charged.
4. That there are in fact two offences charged.
5. That the defendant is called upon to defend himself against an uncertain and ambiguous charge, and in fact that he does
17 not know whether he is charged with the offence of embezzlement or that of larceny.
6. That even if all the allegations of the Information were proven that still the defendant would not have been proven to have committed any offence.

Wherefore defendant prays that the information against him be quashed and that he be dismissed.

JOSEPH ANDERSON, JR.

San Juan, Porto Rico, August 18th, 1904.

Received copy of the above.

LUIS CAMPILLO,
Prosecuting Attorney.

And the Court decided the said motion as follows:

The accused, by his counsel, has presented a motion asking the court to quash the information, which motion has been duly argued. The said motion is essentially the same as the one made heretofore to withdraw his plea of not guilty, even more extensive than that motion, which goes to show that he has suffered no prejudice to his rights in not being permitted to withdraw his plea of not guilty. The court has duly considered the motion and has also considered the information, and the arguments of counsel, and is of the opinion that the law is against the motion and overrules the same. The crime with which the defendant is charged is only the crime of embezzlement.

EMILIO DEL TORO, *Judge.*

August 18th, 1904.

To which ruling of the court the defendant duly excepted.

3. Thereupon, upon the hearing of this case before a jury on the 10th day of September 1904, the defendant by his counsel presented for the consideration of the court the following plea in abatement, to wit:

Now comes the defendant, James E. Kent, by his attorneys Joseph Anderson, Jr., and Ramon Falcon, and pleads in abatement to the proceedings herein, and for cause of said plea says:

18 That said Court is not properly constituted, nor in accordance with law, and therefore has no jurisdiction over the person of the said defendant.

Defendant says that said Court in its organization is not in accordance with the Act of Congress of April 12, 1900, which requires that the jurisdiction of said Courts and the form of procedure in them, and the various officials and attachés thereof respectively shall be the same as defined and prescribed in and by said laws and ordinances and said General Orders Nos. 118 and 195 until otherwise provided by law.

Defendant further says that said General Order No. 118, Section 10, provides that each District Court "will be composed of three judges, one of whom shall be presiding Judge, and who shall constitute a Bench for civil and criminal business."

Defendant further says that said Court as now constituted does not consist of three Judges as provided in said General Order, and in said Act of April 12, 1900, but consists of one Judge, which said Judge has been improperly and illegally appointed, and has no jurisdiction nor authority to act as Judge over the person of said defendant.

Defendant further says that the said court has jurisdiction only as granted to it by the Act approved March 10, 1904, of the Legislative Assembly of Porto Rico, but he states that said Act does not confer by its phraseology, either directly or indirectly, any jurisdiction of any kind whatsoever over the person of this defendant or the person of any other defendant who might be brought before said court.

Defendant further says that he has been informed and
19 verily believes that the Honorable Juan Morera Martinez, President of the District Court of San Juan, as properly constituted and continued in existence by the said Act of Congress of April 12, 1900, has never resigned nor has been removed from the office of said President of said Court, and that he has not been legislated out of said office. That the said Juan Morera Martinez is still President of the District Court of San Juan, and should, under the laws of Porto Rico, act in his official capacity at the trial by jury of this said defendant.

Deponent further says that the appointment of the Honorable Emilio del Toro *was* not, could not, in itself deprive the said Juan Morera Martinez of his right and his duty to occupy said Bench, in the said San Juan District Court; that the appointment of the said Emilio del Toro is unlawful and illegal, and contrary to the spirit and intent of the said Act of Congress of April 12, 1900.

Defendant further says that he has been and would be greatly prejudiced by the said unlawful and illegal organization of the said District Court, for that under the laws of Porto Rico now in force and in force at the time of the passage of the said Act of Congress of April 12, 1900, it was a privilege and right of a defendant charged with a felony to have questions of law determined by three Judges.

Defendant for further plea says that he is a citizen of the United States of America, residing in Porto Rico, and that he has been deprived of his right to an indictment by Grand Jury, but only by presentment by a prosecuting attorney, on information.

Wherefore, the said defendant prays judgment, and that the proceedings against him be abated, and that he be discharged.

20 JAMES E. KENT,
By JOSEPH ANDERSON, JR.,
One of His Attorneys.

UNITED STATES OF AMERICA,
District of Porto Rico, City of San Juan, ss:

James E. Kent being duly sworn, deposes and says that he is the defendant in the above entitled action, that he has read the above Plea of Abatement, and that the facts therein stated are true to the best of his knowledge and belief.

JAMES E. KENT.

Subscribed and sworn to before me this 10th day of September, A. D. 1904.

CRUZ CASTRO,
Notary Public.

Received a copy of the foregoing.

LUIS CAMPILLO.

And the court in ruling on the foregoing plea in abatement rendered the following decision:

When this case was called for trial the accused, through his counsel, presented a sworn statement taking in two points:

(*a.*) That the court not being duly constituted has no jurisdiction over the person of the accused, and

(*b.*) In that James E. Kent, a citizen of the United States, resident in Porto Rico not having been indicted by a grand jury has been deprived of that right.

And in consequence of both premises, the accused moves that the proceedings in this case be abated and the defendant discharged.

These questions were discussed in open court. The representative of the People of Porto Rico verbally impugned the pretentions of the accused, and the court being of the opinion that the law is against the motion overrules the same.

In order to arrive at the conclusion that this court at the present time is improperly constituted, the accused alleges that the law of Congress of April 12th, 1901, continued in existence the tri-
21 bunals in Porto Rico as they had been organized by General Orders No. 118 and 195, series of 1899, the said orders in this way forming a part of the Law of Congress itself. And that the General Order No. 118 provided in its section 10, that each district court shall be composed of three judges, and this provision not having been modified by the Congress itself, the district court of San Juan should at the present time be composed of three judges. And as one judge at the present time constitutes the district court of San Juan, such court is an illegal organization and without any authority whatever.

The law of Congress of the 12th of April 1900 in its section 33 provides in effect;

"That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of General Orders, Numbered One hundred and eighteen, as promulgated by Brigadier-General Davis, United States Volunteers, August sixteen, eighteen hundred and ninety-nine, and including also the police courts established by General Orders Numbered One hundred and ninety-five, promulgated November twenty-ninth, eighteen hundred and ninety-nine, by Brigadier-General Davis, United States Volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith all of which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, and the various officials and attachés thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances, and said General Orders, Numbered One hundred and eighteen and One hundred and ninety-five, until otherwise provided by law:

But, in the same section 33 of the Law of the 12th of April 1900, the legislator says:

Provided, however, that the chief Justice and associate justices of the Supreme Court and the marshal thereof shall be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts shall be appointed by the governor,

by and with the advice and consent of the executive council, and all other officials and attachés of all the other courts shall be
22 chosen as may be directed by the legislative assembly, *which shall have authority to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and attachés for each, their jurisdiction, their procedure, and all other matters affecting them.*"

And under the authority conferred by said provision strengthened and supported by the provisions contained in sections 27 and 15 of the said law of the 12th of April 1900 which is our organic law, the legislative assembly of Porto Rico passed a law which was duly approved by the Governor on the 10th of March, 1904, "To reorganize the judicial system of Porto Rico, fixing the number of judicial districts, providing that one judge should constitute the court to take cognizance of all matters etc."

By the first section of this law, the territory of Porto Rico was divided into seven judicial districts, the first of which is the district of San Juan. By its second section it is provided that "one judge shall constitute the district court" and it provided how such judge should be selected and appointed.

The said law took effect on the first day of July 1904. On the said day the present judge of the district court of San Juan was duly appointed for a term of four years, and on the said day, and after having taken the proper oath, and the presiding judge of the former district court, Hon. Juan Morera Martinez, being present, the present district court of San Juan was duly constituted, which court has been duly and legally despatching the business thereof since that date.

We shall now examine the second of the fundamental allegations contained in the motion under consideration, which is; that,
23 the defendant in this case being a citizen of the United States, resident in Porto Rico and not having been previously indicted by a grand jury, he has been deprived of that right. It is a fact that the accused in this case is a citizen of the United States; moreover the defendant in this case is also a resident of Porto Rico. Truly the American flag waives over Porto Rico as a sign of government; but does the constitution follow the flag? This problem has been presented before the Supreme Court of the United States itself, and the men who form that high tribunal, great for their learning and great for their virtues, have not been unanimous in their decision.

Porto Rico must be considered as an unorganized territory. In consequence of the war between the United States and Spain, Porto Rico came to form a part of the United States, but its civilization being different, the language different, could it immediately form a part of the United States as a state or as a territory? The facts answer this question in the negative.

Porto Rico being occupied in 1898 was governed by a military government, supreme and absolute. Thereafter in 1900 civil govern-

ment was installed and the law which gave life to this civil government is in force at the present time.

The accused, James E. Kent, abandoned the continent, we must suppose, of his own free will and came to reside in Porto Rico, and he should abide by all of the consequences of his acts.

The crime with which he is charged is a common crime and under the jurisdiction of the ordinary courts. In this island there is only one court which works with a grand jury: the District Court of the United States in and for the District of Porto Rico. But the jurisdiction of that court is clearly defined, and the crime with
24 which James E. Kent is charged, as it is said to have been committed, does not fall within the jurisdiction of said court.

Before the passage of the organic law, under the organic law, and after the passage of the organic law, the insular courts have always worked without a grand jury. And the accused should have known this before he committed the crime, if it is true that he did commit it; and all of the safeguards and guarantees granted to the accused by the laws in force in Porto Rico at the present time which are given to the residents of this Island.

And the accused, in our opinion, has no right to anything more.

The foregoing are the reasons in view of which we overrule the foregoing motion.

EMILIO DEL TORO, *Judge.*

To which ruling of the court defendant duly excepted.

4. Thereupon, upon the 10th day of September, 1904, upon the continuation of said case, and upon the empaneling of the jury, the defendant through his attorneys objected to the panel of the jury on the ground that the jury was summoned and organized by a court without authority to act, which objection was overruled, to which ruling the defendant by his attorneys duly excepted.

5. Thereupon, the defendant objected to the juryman José La. O. Otero on the ground that being unable to read and write he was incompetent to sit upon this case, which objection the court overruled and the defendant duly excepted.

And the said juror, José La O. Otero, was afterwards peremptorily challenged by the defendant, the said defendant not having availed himself of all of the peremptory challenges to which he was entitled under the law. And it should here be made to appear that the jury which sat in this case, was expressly accepted by the parties,
25 with the only exception on the part of the defence of the general objection that he had already made to the panel.

6. Thereupon, at the continuation of said case on the 12th day of September, 1904, the Fiscal presented Mr. B. R. Dix as a witness in said case, the defendant by his attorneys objected to said B. R. Dix testifying on the ground that it appeared from the statement in the information that the said Dix was an accomplice or an accessory of the said defendant and should only be allowed to testify in corroboration of other evidence, which objection was overuled, to which ruling the defendant by his attorneys duly excepted.

7. Thereupon, the witness being asked: "Como tal Tesorero que obligaciones tenia Ud.?" (As such treasurer what were your duties?) the defendant objected on the ground that the constitution of the club was the best evidence in regard to the treasury of the club, which objection the court overruled; the defendant duly excepted.

8. Thereupon, the witness being asked: "Ud. tuvo algun contrato ó le encargó (refiriendose al acusado) de algo referente á esa institucion en el Club?" (Did you have any contract, or did you charge him with any duty (referring to the accused) in regard to that institution, in the Club?"), the defendant objected on the ground that the question was immaterial because it was not shown that the witness had authority to give authority to any other person, which objection being overruled, the defendant duly excepted.

9. Thereupon, the witness being asked: "Explain what occurred between you and Mr. Kent?" the defendant objected on the ground that the witness was incompetent to testify what occurred between himself and the accused, which objection being overruled, the defendant duly excepted.

26 10. Thereupon the witness testifying: "That on the Monday following the Saturday of the election I asked Mr. Kent if he had the books ready and he answered me, no." To which statement the defendant objected on the ground that the witness was incompetent to testify to conversations between the witness and accused, which objection being overruled, the defendant excepted.

11. Thereupon, the witness testified word for word as to the conversation had with the accused in the following manner: "My God, Mr. Kent, what have you done with that money? I cannot tell you sir. You have not used it frivolously? I cannot tell you. Mr. Kent you know that I have to replace that amount, where have you spent it, or where have you lent that money so that we may put hands on it again? You know that I have no money with which to replace it. Tell me where. I cannot tell you sir, except as to three hundred dollars which I lent a friend in New York. Mr. Kent can you obtain that money? If you will give me time to write I can obtain it. Mr. Kent where can you get more money to replace this money that you have used? I have friends and relatives in the United States; if I am given time to write them, I may also be able to obtain something from them. They will do everything possible to replace this money appropriated." And the defendant objected on the ground that it was impossible for the witness to testify word for word as to a conversation had six months before.

12. Thereupon the witness continued to testify as to conversations had between himself and the accused, and the defendant reiterated his objections, which objections were overruled, and the accused duly excepted.

13. Thereupon, the witness testifying that: "After 4 o'clock on Tuesday afternoon Mr. Harry remained in the office to verify
27 the entries and figures of the books to arrive at the proper defalcation; after having arrived as near as possible with the data which we had * * * ," to this statement the defendant objected on the ground that it was immaterial, and that it made no

difference whether Mr. Dix and Mr. Harry were looking at the books or were taking coffee. Whereupon the evidence was as follows:

F. Did you examine those books?

W. Yes sir.

F. Did you study them?

W. Yes sir.

F. To what amount did the fraud ascend?

The defendant objected upon the ground that if the books were not evidence, statements of the witness concerning them were not proper evidence, which objection the court overruled and the defendant duly excepted.

14. Thereupon the witness testifying that they (Kent and the witness) arrived at an amount of seventeen hundred and odd dollars as the defalcation, the defendant objected, first, that it was not proved that the conclusion that they arrived at was correct; second, that the books would show if there is any defalcation and what it is, which objection the court overruled and the defendant duly excepted.

15. Thereupon the following evidence and proceedings were heard:

W. On the morning of the following day, Thursday, I received a note from Mr. Kent.

A. I object to all proofs concerning the contents of this note.

F. Do you have this note here?

A. I object to the introduction of any testimony or docu-
28 ment made by the accused after he had had notice of this defalcation, unless it is shown that it was made voluntarily, without any promise, this without trying to be a proof to defend another person; in other words, that all the requisites provided for before any admission or testimony of any confession or knowledge be carried into effect.

J. Witness shall continue stating the facts.

F. Was this paper the note that he gave you?

W. I wish to say to the Judge that I said that I received a note. The note was not directed to me, but was given to me by the person to whom it was directed.

F. To whom was it directed?

W. To Mr. Harry.

F. Were you there when it was given to him?

W. No sir.

F. So that you had knowledge of this note because it was given to you by Mr. Harry?

W. Yes sir.

F. Do you know the handwriting of that note?

W. Yes sir.

F. Whose handwriting is it?

W. Mr. Kent's.

F. On what do you base your opinion that it is Mr. Kent's handwriting?

W. First, because it is signed by him; second because the handwriting is very familiar to me.

A. I object to all continuation of proof concerning this note until its contents are made known to defendant's counsel.

F. The Fiscal has not as yet made its contents known to anybody.

J. We are investigating a fact.

A. Witness is testifying in regard to this note without having demonstrated that it is material.

F. The Fiscal would like to have explained what we must understand by material.

A. Defendant's counsel has a right to inspect or look into all proofs which may be introduced before knowledge of it is given to the Jury or to the Court.

F. I have not as yet introduced it.

A. Proof regarding its contents has already been introduced since witness testified that the note is signed by Mr. Kent.

(Note is handed by the Fiscal to defendant's counsel.)

F. What did he mean to tell you by this note?

A. In order to save time I have no objection to the note being read. I admit as proof this document or note. The Fiscal may continue presenting proof of this kind.

F. What was he telling you in that paper?

A. I object to this question; the note has been introduced, I asked that it be read.

F. The Fiscal limits himself questioning as to the contents of the document, because the proper moment has not arrived when it should be read.

J. The point has been sufficiently argued. Witness shall answer the questions of the Fiscal; the document need not be read.

F. What was his object in sending you this document? What did it say?

A. I object to any answer of witness respecting the contents of the note.

F. The fiscal adheres to his opinion. I can present, as will be seen later, the books, *for* which it will be necessary for a person competent in figures to indicate to the jury what parts of those books the fiscal presents as evidence; and if I should at this time consent as to this small piece of evidence, as to this paper, supported by a ruling of the court, later the defense would ask that these books be submitted to the consideration of the jury in order that they might speak for themselves, and the fiscal understands that it should not be so.

J. As the document has been admitted as proof and shall be submitted to the Jury that it may be read and carefully examined, and as the Fiscal is now making the examination of proof of one of his witnesses, the Fiscal may continue questioning the witness with regard to the document. The whole document shall be submitted to the Jury."

And the questioning was continued and finally the document was read to the jury, translated into Spanish by the official interpreter of the court.

To all of these proceedings the defendant objected. His objection being overruled was duly excepted to.

16. Whereupon, there being certain questions asked as to the contents of the books and an additional investigation about them, the defendant objected and his objection being overruled, he duly excepted.

17. Whereupon, at a continued hearing of said case in the afternoon of said 12th day of September, 1904, the witness being asked: "What entries are made, or should be made in this book?" the witness replied: "The entry of the shares of stock and the entries of fees for entrance of members in the club." To which question and answer the defendant objected in reference to the increase in the book, because it had not been shown that the defendant ought to have made or made any entries in the book; there has been no evidence to show that the defendant had to make entries in this book, which objection being overruled the defendant excepted.

31 18. Whereupon, the witness answering questions of the Fiscal that he gave orders to Mr. Kent that he should secure a book to open a cash account, which he should open subject to my approval and which he should show to me, which answer the defendant objected — on the ground that the fact that orders were given is proof, but the order in itself is not proof which was hearsay evidence, which objection being overruled, the defendant duly excepted.

19. Whereupon, the witness having been asked if there are entries in that book and if there were any signatures alongside of these entries, the defendant objected on the ground that the books were present in court and could "speak for themselves," and on the further ground that this book was a book kept by the collector, according to the very declaration of the witness and contained a detailed statement of the sums delivered to the witness personally and that there is nothing which connects this book with the defendant, which objection being overruled and the witness being allowed to testify as to the contents of the book, the defendant duly excepted.

Then the witness continued and said: "This book is made in several columns; in one column appears the money in cash received in the Club; in another money received for tickets worth different prices, and which are taken at the Club as money; another column the total of the two. * * * The accused then objected, on the ground that the book was kept by the collector and contained an itimized statement of the amounts delivered to the witness personally, and that there was nothing in the book which could be connected with the accused. And the witness having testified in answer

32 to questions put by the Judge, that the collector, Mr. Kent and himself all had to do with the book, and the accused being present, who could explain the book if he desired, the court ruled that the witness might continue his testimony, to which ruling the defendant duly excepted.

20. Whereupon, the witness being questioned — in the following manner:

F. On the 21st of March, adding the amounts delivered from the 13th to the 21st, what is the total of entries in this book?

W. From the 13th to the 21st inclusive, one hundred and fifty dollars and sixty-five cents.

F. What expenses did the Union Club have from the 13th to the 21st?

W. Twenty-three dollars and seventy-five cents.

F. So that the balance is a total of——

W. Of one hundred and twenty-nine dollars and thirty-one cents, after deducting the expenses.

The defendant objected.

A. I object to these questions, and beg the Court to instruct the jury not to take into consideration this proof because it seems to me it does not connect with the accused as if it were a balance of the Government of the People of Porto Rico during those days. There is absolutely nothing to show that Mr. Kent had those moneys." Which objection being overruled, the defendant duly excepted.

21. Whereupon, the witness being asked and having answered many questions in regard to the books and contents thereof, as appears on pages 52 to 56 of the record, the defendant objected on the ground that it does not appear whether or not the books were delivered, that the witness does not know whether they were or not, and because it does not appear proved as a question of fact
33 how many books were printed or how many delivered, to all of which the defendant objected, and his objection having been overruled, he duly excepted.

22. Whereupon the witness being asked what was said by the defendant to the witness in respect to this liquidation, the defendant objected, which objection being overruled the defendant duly excepted.

23. Whereupon, the fiscal attempted to offer in evidence a certain document which the witness had recognized and had testified to have been signed by Mr. Kent, the defendant, and Mr. Alfredo A. Smith, to the presentation of which document the defendant objected on the ground that its competency had not been established in accordance with the custom in law in as much as it had not been shown to have been free and voluntary and given without promise of reward or without promise of freedom from prosecution.

The accused requested that the jury withdraw while the question of the competency of the evidence should be decided by the court, and the court ruled as follows:

This being a question as to the jurisdiction (?) of the court, and the accused having requested it, the court decides the question in favor of the accused, and therefore, while this preliminary question is being decided in the court, the jury will please withdraw, and when the question is decided, it will be submitted entirely to the consideration of the gentlemen of the jury. The jury withdrew and then the following proceedings took place, the witness having been examined and cross-examined as appears on pages 66 to 78 of the record, in the following manner:

J. The Fiscal was presenting a document, or rather, interrogating the witness in regard to a document. As yet we do not
34 really know what that document contains. We should continue to interrogate the witness in order to ascertain what it is.

A. The document is before the court. If it is to be used as evidence, it should be presented. It is not necessary to call upon the witness to read it; the witness has said all that he really can say about that document.

J. In regard to the conditions of that document.

F. I am going to prove that it was free and voluntary. How did you come by that document? Explain to the court.

W. As I have explained heretofore I write the contents of this, using the expressions and relating therein what Mr. Kent had related to me personally. Perhaps in the very words, or the contents of the letter were confessed in presence of Mr. McCormick. In order that I might have the document as proof, because he had not been tried or arrested, fearing that he might escape from the island, leaving me without any proof of the fact. I wrote, as I said, perhaps in his words and took it to him personally.

F. Where?

W. To the house of Mr. Kent; I showed him the document; he read it. I asked him if he would sign it; he did not make any objection, but before signing I told him to call a witness there in his house to witness his signature, which he did, calling a personal friend of his with whom he lived and they both signed the document, one, Mr. Kent as his confession and the other as a witness.

F. What was the other's name?

W. Alfred A. Smith.

F. Whose signatures are those that appear at the foot of that document?

W. One of them is Kent's and the other is the signature of Alfred A. Smith.

35 F. How do you know that they are the signatures of Mr. Kent and Mr. Smith?

W. Because they signed in my presence.

F. You say that it was in Kent's house?

W. Rather in the house of Mr. Smith and in Mr. Kent's room. Mr. Kent lived in Mr. Smith's house.

F. Do you remember more or less at what hour? In the afternoon or in the night?

W. After dinner.

F. You know that that other signature is Mr. Smith's signature; he signed in your presence?

W. Yes sir. If the court will excuse me a moment, I can't state absolutely whether it was before or after the dinner hour, because on several occasions I had to go and talk with him during the two or three days that I was liquidating, so that I am not able to state whether it was in the afternoon. I know that it was after office hours, but I cannot state whether it was before dinner or not.

F. In order to continue to prove that the signature was voluntary, I must have the witness Harry appear.

F. Is Mr. Smith in the Island?

W. No Sir.

F. Where is he?

W. I cannot say, he left for Panamá, and since then I have had news that he is in New Orleans.

Witness L. D. HARRY.

F. Mr. Harry, take that paper. Those two signatures at the foot of that document, whose are they?

W. Of James E. Kent and the other of Alfred A. Smith.

F. How do you know they are Mr. Kent's and Mr. Smith's?

W. As far as I can read them.

F. Do you know those signatures?

W. I know Mr. Kent's.

F. And Mr. Smith's?

36 W. I am not sure.

F. But it looks to you like the one that he ma'.es?

W. I have not seen his signature a great many times. I am sure about Mr. Kent's.

F. Does not that signature of Mr. Kent's call your attention, do you find it regular like that of a man who signs voluntarily?

W. That is his signature.

F. (Showing him another document.) Do you notice any difference at all between those two signatures?

A. I object to that question because it has not been shown that the witness is a hand-writing expert.

J. This other document having been presented the court can consider.

F. I have finished with Mr. Harry. (He withdraws.)

A. Did you take that document to the house where Mr. Kent lives?

W. Yes sir.

A. Was he desirous of signing it immediately?

W. He first read the document.

A. Was there any discussion in regard to the document itself?

W. A few words.

A. What was said between you and him?

W. Mr. Kent asked me when I took the document, "Do you wish that document to prosecute me before the courts?" and in answer I said to Mr. Kent these words: "Mr. Kent the books and documents of the Union Club are in such a condition that they would themselves convict you before any court."

A. Did you promise him not to use this?

W. I made no such promise.

37 A. Did you ever promise him not to make use of this at any time?

W. Never.

A. Did you not promise him that if he would sign this he would not be prosecuted?

W. No sir. The very words that I used I used intentionally, not knowing whether I would need to use this document or not.

A. What did you tell him?

W. The same words which I have said to you; the books and accounts of the Club would convict you.

A. Did you promise him anything?

W. No sir.

A. Do you mean to say, Mr. Dix, that this defendant has signed this document without having any promise from you of any kind?

W. Yes sir, and for further proof I can repeat the conversation which passed between us.

A. When he signed this document was Mr. Kent an employee of the treasury department?

W. I do not remember exactly the date on which he was discharged by the Treasurer, but I think he was no longer an employee at that time.

A. Had he been up to that time?

W. He was up to the time he was discharged by the Treasurer.

A. And a good many months prior to that date?

W. Several years.

A. What position did he occupy?

W. Bookkeeper or assistant bookkeeper.

A. Will you please tell me why he signed that document?

38 W. The object is clear on the face of the document.

A. What was his object in your opinion?

W. As he said at that time, he desired to go and do all, that he could to help me and I presume that he signed the document in order to see if I would be a little easier on him.

A. Did you not promise him to be kinder or easier on him?

W. Not at the time the document was signed.

A. When?

W. When he promised to return me the money if I would give him time to write to the United States and obtain money to replace what he had taken from me.

A. Before signing the document?

W. Yes sir.

A. Did you not give this defendant to understand that if he signed that document he would not be prosecuted before the courts?

W. No; a short time before I had told him on the advice of counsel that if he would return me the money I could promise him, but on that condition.

A. Then he gave you that document to protect you in case your responsibility with respect to that money should at any time be questioned?

W. He gave it to me considering that I might be easier on him and help him to get out of this, and possibly with the idea of protecting me. This is the idea of procedure as I had asked him, and in this way, I presume, he signed it.

A. Do you not believe that the accused had in his mind that he signed in his favor?

F. I object.

J. He has heard enough questions in regard to his mind.

39 A. What was the date of that document?

W. The document was written by me on the 8th, not being able to go (on that day) at that time to obtain the signature, I changed it for the date on which he signed.

Testimony of the Witness Frank H. Dexter.

A. Mr. Dexter, did you at any time represent Mr. Kent?
W. Temporarily, yes.
A. Did you go to see Mr. Dix in his company?
W. Yes sir.
A. Have you seen that document before?
W. No sir.
A. You do not know whether this document was the subject of a conversation between you and Mr. Dix?
W. The conversation to which counsel refers, something was said in regard to some document; whether it has any relation to the present one or not——
F. The fiscal objects. I object to the answer and to the question, because it refers to hearsay evidence.
J. You should state what you know in regard to concrete facts.
A. Was the conversation in regard to a written confession?
W. It was.
A. What was it that Mr. Dix promised with respect to that for the signature of the confession?
F. In so far as it refers to what was promised, the Fiscal objects.
A. Was Mr. Kent present?
W. Yes sir.
F. I continue to object.
A. The Fiscal may reach the accused through the witness.
F. The Fiscal does not enjoy that privilege like the defence.
A. This witness was present at a conversation between him and another witness, the accused being present, and there is a question here, and it is whether that other person on touching that confession made any promise with respect thereto, or more concretely, the question whether that confession was voluntary or not. Even if the defendant personally declared how he would do it, it would be necesssary on the part of the defendant to corroborate his testimony in so far as it would be testimony contradictory to that given by Dix.
F. It is necessary to prove that Mr. Dix was present at that conversation, where and on what date.
A. The conversation took place with Mr. Dix.
J. You may answer.
A. What was it that Mr. Dix promised in regard to that confession?
F. The Fiscal desires to know whom he promised.
A. Who were present?
W. Mr. Dix, Mr. Kent and I. During the course of this conversation reference was made by Mr. Kent to a confession, speaking with Mr. Dix, Mr. Kent complained that Mr. Dix was not carrying out his promise, which, as Mr. Kent said, Mr. Dix had made. Then Mr. Dix showed or said that he agreed to the promise and would

stand by what he said. And as counsel at that time for Mr. Kent, with the idea that that confession had been involuntary and irregular, so that it could not be used against the defendant, and had been given by Mr. Kent under the promise that he would in consequence thereof be relieved of all criminal liability in this
41 matter, I spoke to Mr. Dix, and told him that I thought he ought not to make use of that document.

F. The Fiscal objects, on the ground that we are no longer on that conversation. I withdraw the objection.

W. Mr. Dix then said that he intended to keep his promise to Mr. Kent, but there was something about the way Mr. Dix expressed himself, which made me think that he did not intend to retain him, and in view of the fact that acts had been commenced, which Mr. Dix could not stop, that the action of Mr. Dix must be guided by future developments.

F. On what day did that conversation or conference take place?

W. I cannot remember.

F. Do you remember whether many days had passed since the meeting of the Union Club for the election of the President?

W. I do not remember.

F. Do you remember whether Mr. Kent had been arrested yet?

W. Yes he had been arrested.

F. And you stated that the intention and the words of Mr. Dix were not the promise not to use that confession, or his words were not such as to bind himself?

W. I can only reply stating that Mr. Dix had made that promise to Mr. Kent, but in the conversation with me and Mr. Kent on that day, after the confession had been obtained; I can only state in regard to the words of Mr. Dix, that there was some reservation on his part.

F. Do you know to what sort of confession he referred?

W. In the conversation reference was made to a confession of guilt made by Mr. Kent.

F. Do you know whether reference was made to a verbal
42 confession or a written confession.

W. If my memory serves me right, Mr. Dix made reference to a written confession which he then had in the iron safe.

F. Do you know how many days Mr. Kent had been arrested when that conversation took place?

W. I cannot say.

F. Was it some days or weeks?

W. A few days, I cannot say how many.

J. Can you state definitely that that document contained the confession to which you refer?

W. I have never seen that document until this moment, but from the contents of the same, I can say that what that conversation treated of and the conversation referred to, were substantially the same as is involved in this document.

Dix: May I ask a question?

A. I object.

A. Can this witness remain in court?

J. The witness may remain in court.

Defendant, JAMES E. KENT.

A. I only introduce at this time——

F. Is the witness subject to all kinds of interrogatories?

J. The Fiscal may interrogate the witness on this point.

F. The Fiscal objects to allowing the accused to limit himself to what is to his interest and that it be not permitted to interrogate him on matters prejudicial (to his case.)

A. This is a question of competency.

F. I withdraw the objection.

43 A. Look at that document. Do you know who wrote that document?

W. By Mr. B. R. Dix.

A. Signed by yourself?

W. Yes sir.

A. State to the court the circumstances and reasons for which you signed that document.

W. Mr. Dix went to the house where I lived on the night of a Thursday; I do not remember exactly the date, whether it was the 11th or the 12th, he was walking up and down in front of the door, and some one came up the steps. Mr. Dix told me that he had a document in his pocket which he wished me to sign. Then I entered my room and read the document. Then I turned to Mr. Dix and said: "Mr. Dix, do you not understand that to sign such a paper as that would be a fatal admission? Mr. Dix said to me: "I do not intend to use that document under any consideration. I will put it in the iron safe and will not show it to anyone." I talked with him about four or five minutes before signing the paper and he told me that the reason he wanted that document was that any time perhaps in the future, if I should obtain any property and this question had been adjusted he would have something to show, and his promise was that if I signed that document the proceedings which he had commenced against me,—or rather that he would not institute proceedings against me. I signed that document because if the circumstances with which it was connected should become public it would be more for me than to sign a document like this two or three times more than the amount which appeared. The promise *was* made by Mr. Dix was that if I signed this document the proceedings instituted against me would be stayed, and I signed that document simply in order to stop the proceeding where it was then.

44 Two days after this the arrest was made. It was made on Saturday the 14th of May.

A. That was all which took place when that document was signed?

W. Yes sir.

A. Were you present on the date stated by Mr. Dexter?

W. Yes sir, I was.

F. This other signature, here of Mr. Smith's, do you recognize it?

W. Yes sir.

F. How do you explain that this being the document which should never come to light a witness should be called to witness your signature?

W. I cannot answer that.

F. So that Mr. Smith signed——

W. Mr. Smith did not read the document. When he entered the room, I said to him: "I wish you to witness that I sign here."

F. With what object did you make him sign here?

W. Mr. Dix insisted on there being a witness to my signature.

F. Do you know why a witness was required to sign?

W. No sir.

F. Do you think that when a proceeding is commenced against a citizen they may be stopped at the will of the injured party?

W. I do not know; but the proceedings had not been commenced. This signature was given on Thursday, and the proceedings or the arrest was not made until Saturday.

F. But the publicity which had been given to the occurrence, did not that appear on the Sunday before the arrest? or on the 8th?

45 W. That document was given two days before under the promise that the proceedings would be stayed.

F. Then there was some proceeding going on.

W. I was told that the matter was absolutely unknown except to three persons.

F. Had you not read in the newspapers what was said?

W. Nothing was said in the press until the following Saturday.

And the court decided after having considered the evidence offered by both parties, to admit the document as evidence. Whereupon *a* session of the court closed; and in the next session the accused, through his counsel made an extensive oral argument, requesting the court to reconsider its decision to admit the document in evidence. The Fiscal opposed the request, and the court decided as follows:

The court formed its opinion on yesterday, and that opinion has in no wise changed in view of the arguments of the defence, to which the court has listened and considered scrupulously. Therefore, the admission of such document as evidence is sustained, and when submitted to the jury proper instructions will be given with respect to the same." And the document in question is as follows:

"SAN JUAN, PORTO RICO, *May 12th*, 1904.

Mr. B. R. Dix, San Juan, P. R.

MY DEAR MR. DIX: It is with the deepest humiliation and sincere regret that I have to make you the following confession; you will find upon examining the books and records of the Union Club that I kept for you, as Treasurer of said Club, that I have received and appropriated to my own use about Eighteen hundred and ninety-six dollars, and seventy-seven cents, ($1896.77). The method I have employed to keep this from you is by failing to charge up the full amount of initiation fees and stock subscriptions. I have also used part of the money turned in by the collector for Club receipts for the Bar, bowling alley and & also sold (40) forty ($5.00) — dollar ticket books.

I can offer no satisfactory excuse to you for this action, but will

say this, that if given thirty days I will make good every
46 cent. There is no use stating that I know the sacrifices you will have to make to make good the shortage I have caused you, but before God and these witnesses I will make good every cent if I live.

Forgive me if you can.

Sincerely, JAMES E. KENT.

Witness:
ALFRED A. SMITH."

And the defendant duly excepted to the admission.

24. Whereupon, at a continued hearing of said case on the 13th day of September, 1904, Mr. Peterson having been introduced as a witness by the Fiscal an objection was made to said witness' testifying on the ground that his name had not been presented to the defendant in accordance with law, together with the names of other witnesses. Which objection the Court overruled, and the defendant by his attorneys duly excepted.

25. Whereupon, the said witness having been asked if he knew that Mr. Dix conferred the duties of treasurer upon any other person, the defendant objected upon the ground that the witness was incompetent to testify to that point, which objection being heard was overruled by the judge, and the defendant duly excepted.

26. Whereupon a certain book having been put into the hands of witness, H. Peterson, by the Fiscal, and the defendant through his counsel having asked to be permitted to examine that book, the court decided that the book in question not having been admitted in evidence, but the witness having answered questions put in regard to the book, the defense had the right to cross examine the witness as fully as necessary. And the book having been put in the hands of the witness and the defence having cross-examined said witness in the manner and form which he deemed proper, *and* the accused duly excepted to the ruling of the court, after having finished the cross examination of the witness.

27. Whereupon, the witness L. D. Harry was introduced by the Fiscal and among other questions was asked the following:
47 "Did you testify before the Fiscal of this Court, Mr. Rossy?"
To which question the defendant through his counsel, objected on the ground that this question was for the purpose of impeaching the witness, which could not be done, because said witness being a witness for the government, could not be impeached by the prosecution. After the objection was argued it was overruled by the court, in accordance with the law, and especially in accordance with the provisions of sections 243 and 245 of the Code of Criminal Procedure, in view of the fact that the Fiscal complying with all of the necessary requirements, was endeavoring to show that the witness had on former occasions, made statements which agreed with his present testimony; and the defendant duly excepted.

28. Whereupon, the Fiscal presented to the witness a paper purporting to be his declaration before the said Fiscal Rossy, on the

21st of May, 1904; to the presentation of which document and to any other evidence in regard to it, the defendant duly objected on the ground that it was contrary to section 245 of the Code of Criminal Procedure, and on the further ground that the witness being the government's own witness should not be impeached by the Fiscal, which objection being overruled, the defendant duly excepted.

29. Whereupon, the said document above referred to being presented to the said witness, the defendant by his attorneys duly objected on the ground that they had not been permitted to examine or read said document prior to its being presented to said witness, and inasmuch as it referred to a sworn declaration made at another time by the said witness before Fiscal Rossy, which fact the attorneys for the defence denied, and the objection having been overruled, and the Fiscal having been permitted to read said declaration to the witness, in accordance with sections 243 and 245 of the
48 Code of Criminal Procedure, the accused duly excepted.

30. Whereupon, Mr. G. Candina having been produced as a witness by the Fiscal and having been objected to on the ground that his name was not included in the list of witnesses furnished by the Fiscal to the defendant, which objection the Court overruled, and the defendant duly excepted.

31. Whereupon, Mr. Innis having been produced as a witness the same objection was made by the defendant, which objection being overruled, the defendant duly excepted.

32. Whereupon, Mr. Louis Tuzo having been introduced as a witness the defendant made the same objection, and the objection having been overruled the defendant duly excepted.

33. Whereupon, upon the 13th of September, 1904, at a continued hearing of said case, in the evening, the defendant by his attorneys Joseph Anderson Jr., and Ramon Falcon presented the following motion:

"Now comes the defendant in this case by his attorneys, Anderson and Falcon, and moves this Honorable Court that the jury be instructed to bring a verdict favorable to the accused. The grounds for this motion are that there is not sufficient proof to sustain a conviction nor to overcome the presumption of innocence of the defendant, that there is no proof to sustain the offence with which the defendant is charged in this case."

Which motion having been argued by both parties was overruled by the Court, and the defendant duly excepted.

34. Whereupon, the witness B. R. Dix, having been sworn and having been asked if he was the treasurer of any club, association or institution at the same time, the Fiscal objected and the judge sustaining the objection, the defendant duly excepted.

35. Whereupon, at a continued hearing of this case, on the 14th of September 1904, upon the conclusion of the evidence both by the defendant and by the government, counsel for the defence asked that that part of the record in which appeared the testimony of the witnesses Dix, Kent and Dexter concerning the so-called con-
49 fession which the Fiscal had offered in evidence be transcribed by the stenographer and given to the jury so that the jury

might have full knowledge of all of the circumstances connected with the so-called confession, which motion was denied by the court, in accordance with the law and especially section 274 of the Code of Criminal Procedure, and the accused duly excepted.

36. Whereupon, the defendant moved through his attorneys, that Messrs. Dexter and Kent be allowed to testify as to the circumstances surrounding the alleged confession before the jury, which motion was granted by the Court, and the witnesses testified, as follows:

Testimony of the Witness Frank H. Dexter.

A. What is your name?

W. Frank H. Dexter.

A. What is your occupation?

W. Lawyer.

A. Were you at one time attorney for the accused in this case, Mr. Kent?

W. Provisionally, yes.

A. Will you repeat in the presence of the jury the testimony which you gave before the court in reference to a certain document supposed to be the confession signed by the defendant, Kent?

W. I think it was several days after Mr. Kent had been arrested and had been put under bond and was at liberty. I accompanied him to visit Mr. Dix in the office of the treasurer. In that conversation reference was made by Mr. Kent to a certain document which Mr. Dix had in reference to this question prior to that date, and which was referred to as a confession made by Mr. Kent.
50 Mr. Kent desired that Mr. Dix should not make use of that document, and he reminded me especially to make the conversation drift to that point. He (Mr. Kent), had related to me the circumstances, and as his attorney I felt that it was absolutely improper to make use of that document against him, because, under the circumstances and facts it was not voluntary and had been given under the promise that no trial should be had against Kent in this case. On stating substantially this to Mr. Dix, he replied that he had not given that promise not to make it public, and prosecute the defendant by means of that document; Mr. Dix insisted that some arrangement be made on the part of the accused, Kent, to return to Dix the money defalcated; that is as near as I can remember.

F. So that Dix had promised that he would not make use of the document if he would return to him the amount which was the object of the fraud. In other words, it was a conditional promise.

W. It was an absolute condition; it was not conditional.

F. How was the money spoken of, as you state?

W. That was partly the object of our visit, but separate and distinct from the other question.

F. In your opinion?

W. According to the facts.

F. Formerly, the other day when you appeared, did you not state to Dix after leaving here, that you were sure that what had been said was that if he would deliver the money to Dix he would bind himself not to make use of that document?

W. Dix asked me if that had not been said in the conversation, and I told him that I thought so, in the same way that I do now, but that was after the conversation in regard to the confes-

51 sion.

F. You also said the other day that in all of Dix's statements a reserve could be noticed.

W. That was what I referred to.

A. In regard to the promise that he would not prosecute the accused, nor use this document, did you say that an absolute promise was given, and not a conditional one?

W. As I understood Mr. Dix on that occasion, Mr. Dix expressed himself to the effect that he had given an absolute promise not to make use of that document, but that after having obtained that document he desired to join a condition to the same.

A. But after having obtained the document?

W. That was what I understood.

J. That promise to which you refer, did Dix make it in your presence?

W. He made it directly to me, in a direct conversation with me.

J. In order to obtain the confession Dix made the promise to you in your presence.

W. No sir.

J. You were not present at that moment?

W. No.

F. Do you know section 37 of the Penal Code which says that every person who knowing that a crime has been committed and does not denounce it will be an accomplice therein?

W. That was a question which concerned Dix more than me.

A. As I understand it, I may examine Mr. Kent in regard to that document, that the questions will be confined to that matter only?

Testimony of the Defendant James E. Kent.

52 A. Did you sign a document which was supposed to be a confession?

W. Yes.

A. Who wrote that document?

W. Dix.

A. State in as few words as possible the circumstances surrounding the presentation of that document to you and that induced you to sign it, confining yourself entirely to that document.

W. On Thursday the 12th of May, Dix came to my house, and showed me a letter which he himself had written to himself, and told me that if I would sign that document, that letter, that he under no circumstances would take any steps whatever against me,

in the matter between us. That he desired that document so that at any time in the future he could make use of that document if I had any property, he could use that document to obtain money from me, but under no circumstances did he intend to take any criminal action in the matter between us, and even if he were obliged to do so that that document would never be used nor shown to any person whomsoever; keep the matter from the public between us. Under those conditions I would have signed any document, but if I signed that document all matters between him and me would be privately arranged.

F. To what matter does that document refer?

W. It refers to the matter which is before the court and which has been the cause for this being brought here.

F. What did you acknowledge in that document?

W. I acknowledged in a letter written straight to Dix that the charge made in it was true.

F. You also bound yourself to return that amount.

53 W. No sir.

F. Did you not ask in that letter the term of thirty days within which to return the money?

A. The contents of the document is before the court.

F. The Fiscal is questioning the witness and not the counsel for the defence.

J. The question will be answered.

W. I do not remember the words used in that letter at the present moment.

F. Do you know whether that document was signed by another witness?

W. It was.

F. Why did that other witness sign?

W. Dix told me that he would not accept the document without the signature or another witness to certify that I had signed that document.

F. If he was going to keep it why did he need the signature of another witness if he was not to make use of it?

W. That part I don't know about the reasons that he may have had.

F. So that you think that another witness was necessary in order to keep that paper in his desk?

W. I don't think that I have any opinion at all in regard to the matter.

A. Did the witness read that document?

W. No sir.

W. The witness entered the room and I asked him to sign in testimony of the fact that I had signed that paper; if he had read the document, he would not have permitted me to sign it.

F. Was he your guardian?

W. I have no guardian whatever.

54 F. Do you do all of your acts of your own free will or do you need a counselor.

A. I object to that question, because it is not true.

J. The objection is sustained.

37. Prior to the witnesses Dexter and Kent having testified counsel for the accused requested that he be informed whether the document supposed to be a confession signed by the accused, had been admitted as evidence, and he was informed in effect that it had been admitted, and that it so duly appeared on the record. Then from the record appears the following:

A. Counsel asks if it is not the custom when a document is offered as evidence that it should be read by the party offering the same, to the jury?

J. As the document speaks for itself, and will be submitted to the jury, it makes no difference; but if counsel so desires, the secretary may read the document now.

A. Under this ruling I object to the document being read to the jury, or being presented to the jury inasmuch as it was not done so before the conclusion of the case of the government, and also because it is not a repetition of anything that has been offered by the defense."

And it does not appear from the record that the document was read, and it does appear that the same was translated by the official interpreter of the court and the translation accepted by both parties, and a translation submitted to the jury.

38. Whereupon, upon the conclusion of the evidence both on the part of the plaintiff and the defendant, the defendant through his attorneys moved the Court that a verdict be directed favorable to the accused, and that he be declared not guilty, on the further
55 ground that there is no evidence upon which to base a conviction and that there is no proof of the offence of which the defendant is accused, which motion the court overruled and the defendant by his attorneys duly excepted.

39. Whereupon, at a continued hearing of said case on the said 14th of September, present the Honorable Emilio del Toro, Judge, the jury, the defendant and his attorneys and the Fiscal in the said case, and all arguments by both parties having been heard, the Honorable Judge proceeded to instruct and charge the jury as appears on pages 222 to 227 of the record, which said charge of the court and especially that part which refers to what is embraced and contained in the law defining the crime of embezzlement (abuse of confidence), the defendant by his attorneys excepts to.

40. Whereupon the jury having retired, thereafter brought in the following verdict:

No. 822.

THE PEOPLE OF PORTO RICO
v.
J. E. KENT.

"We the members of the jury consider J. E. Kent guilty of the crime with which he is charged, embezzlement (abuse of confidence).

San Juan, Porto Rico, 14th of September, 1904.

(Signed) The Foreman, JUAN APELLANIZ."

Which said verdict is bad in this, and cannot and ought not to sustain the commitment of the said defendant, on the ground that it is contrary to section 284 of the Code of Criminal Procedure, and because the said crime being a crime which is divided into degrees as appears in article 445 of the Penal Code, the said verdict does not specify the said offence, and by its terms could not sustain a sentence for more than the lesser degree of said crime.

41. Whereupon, upon a continued hearing of said case on the 17th day of September, 1904, the Honorable Judge Emilio del Toro being present and the government represented by the Fiscal and the defendant in person, and represented by his attorneys, the
56 said defendant being duly called before *before* the bar was sentenced to three years in the penitentiary, which sentence the defendant considers as being for a longer period than that allowed by the said verdict, the defendant duly makes this exception.

The foregoing is the bill of exceptions of the defendant, the said James E. Kent, in the above entitled case, drawn by his attorneys Joseph Anderson, Jr., and Ramon Falcon, and dated at San Juan this 27th day of March, 1905.

JOSEPH ANDERSON, JR.,
RAMON FALCON.

The foregoing bill of exceptions is approved with such amendments and additions as have been made therein.

EMILIO DEL TORO, *Judge.*

NOTE.—It is made to appear that this bill of exceptions was presented in English and afterwards a Spanish copy of the same was presented by the accused himself, and that said copy, or such translation, is the one which has been considered and signed by the judge of this court.

EMILIO DEL TORO, *Judge.*

I certify
JOSÉ E. FIGUERAS, *Secretary.*

Condition of the Defendant.

The defendant, James E. Kent, is at present at liberty, having furnished bail in the sum of two thousand dollars. Jacob Axtmayer and Ferdinand Schluter being his bondsmen.

Notice of Appeal.

In the District Court, Judicial District of San Juan.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

Now comes the defendant by his attorneys Joseph Anderson Jr. and Ramon Falcon, and in accordance with the law gives notice of

this appeal from the judgment rendered against him in the above entitled case.

JOSEPH ANDERSON, JR.

To the Secretary of said Court.
To the Honorable Fiscal.

San Juan, P. R., September 17th, 1904.

Received notice of above.

LUIS CAMPILLO,
Prosecuting Attorney.

57 I certify that this transcript composed of sixty-six typewritten pages, written on one side only, contains a true copy of all of the essential proceedings in the case of the People of Porto Rico *vs.* James E. Kent, for embezzlement, this which I sign and seal with the seal of this Court being the original, which is forwarded on this day to the Supreme Court, together with nine true copies of the same, sending furthermore, on this day a copy of the same to the accused, and another copy to the attorney-general of Porto Rico.
San Juan, Porto Rico, 29th of June, 1905.

(Signed) JOSÉ E. FIGUERAS,
Secretary of the District Court of San Juan, P. R.

Letter of Sec. Dist. Court to Sec. Sup. Court.

District Court of San Juan, Porto Rico.

Office of the Secretary.

SAN JUAN, PORTO RICO, *June 29th*, 1905.

To the Secretary of the Supreme Court, San Juan, P. R.

SIR: I am pleased to send you herewith the original and nine copies, in the case of the People of Porto Rico *vs.* James E. Kent, on appeal, taken from the judgment rendered herein to that honorable court.

Respectfully,
(Signed) JOSÉ E. FIGUERAS,
Secretary of the District Court.

Filed in my office on this 29th day of June, 1905.

A. F. CASTRO,
Secretary Supreme Court of Porto Rico.

Application of Counsel to be Considered as Attorney for Defendant.

In the Supreme Court of Porto Rico.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

Embezzlement (Abuse of Confidence).

Nemesio Perez Moris, attorney at law, with office open on San Francisco Street in this City authorized to practice the profession, before your honor appears and respectfully states that I have received instructions from the defendant James E. Kent to represent him in this case; and I pray this Honorable Court to consider me as having appeared in the name of the defendant whom I represent, and order that future notices be served upon me.

San Juan, Porto Rico, July 23rd, 1905.

(Signed) N. PEREZ MORIS.

58 Filed in my office on this 24th day of July, 1905.

A. F. CASTRO,
Secretary Supreme Court of Porto Rico.

Application for Time in Which to Perfect Appeal.

In the Supreme Court of Porto Rico.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

Embezzlement (Abuse of Confidence).

James E. Kent through the undersigned attorney at law, before this Honorable Court respectfully states:

That having, a few days since, designated as his counsel herein the undersigned attorney at law, and the record of this proceeding being very voluminous, and the exceptions and grounds on which the appeal is based being very numerous,

Prays this Honorable Court that, bearing in mind the necessity of a careful study of the extensive record in this case by the undersigned attorney at law, it will be pleased to grant thirty days' time in which to draw up and present the writing of appeal.

San Juan, Porto Rico, 4th of August, 1905.

(Signed) N. PEREZ MORIS.

Filed in my office on this 4th day of August, 1905.

(Signed) ANTONIO F. CASTRO,
Secretary Supreme Court of Porto Rico.

Order Granting Above Application.

Porto Rico, August 5th, 1905.—Grant as requested.—Ordered and the Chief Justice affixes his rubric; to which I certify.

[RUBRIC.] (Signed) A. F. CASTRO.

Application for an Order Directing Dist. Ct. to Issue Certificates.

In the Supreme Court of Porto Rico.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

Embezzlement (Abuse of Confidence).

James E. Kent, through his undersigned attorney, appears before the court and states:

That on the 29th of August last he applied to the District Court of San Juan for an order directing that certificates be issued of different documents which appear in the record of the above en-itled cause, the said court having taken no action as yet in regard to the matter, or rather, in regard to issuing the said certificates,
59 with the consequent prejudice to the rights of this defendant, who finds it impossible to conclude his brief in time, taking into consideration the decisive influence of those documents in the proceeding.

The documents of which we desire certified copies are as follows:

The complaint presented on the 14th of May 1904 by Mr. Dix.

Letter of the Assistant Attorney-General addressed to Judge Bazan on the 17th of May 1904.

Declaration of L. D. Harry on the 21st of May 1905 before the Honorable Fiscal.

Declaration of Mr. Dix before the same Honorable Fiscal on the said 21st day of May 1905.

Letter written by Mr. Kent to Mr. Dix on the 12th of May 1904, and its translation.

In view of which I pray this Honorable Court; first,—to be pleased to order the District Court of San Juan to issue the said certificates; and second,—that this court be pleased to order that the term granted to this defendant for perfecting his writing of appeal be not counted during the days passed or which may pass between the date of the application for the certificates above mentioned, and the date on which the same may be issued or delivered.

San Juan, Porto Rico, 6th of September, nineteen hundred and five.

Respectfully,
(Signed) N. PEREZ MORIS,
Attorney for the Defendant.

Order of C. J. Granting the Foregoing Application.

San Juan, Porto Rico, seventh of September, nineteen hundred and five.—Granted as requested.—The Chief Justice, Hon. José S. Quiñones so ordered and affixed his rubric, to which I certify.

[RUBRIC.] (Signed) A. F. CASTRO.

On the 15th of September the foregoing order was complied with, to which I certify

(Signed) CASTRO.

60 *Letter of Dist. Judge to C. J. Sup. Court.*

Chambers of the District Court.

JUDGE'S OFFICE, SAN JUAN, P. R., *September 19th*, 1905.

Honorable José S. Quinones, Chief Justice, San Juan.

SIR: In compliance with your order entered in the case of the People of Porto Rico *vs.* James E. Kent, now on appeal before that Supreme Court, certified copies are herewith sent of the complaint presented on the 14th of May, 1904, by Mr. Dix; of the letter of the Assistant Attorney General, addressed to Judge Bazan, on the 17th of May, 1904; of the declaration before the Fiscal, of the witness L. D. Harry on the 21st of May, 1904; of the declaration before the Fiscal of the witness Mr. Dix, on the said 21st day of May 1904, and of the letter addressed by the accused, Mr. Kent, to Mr. Dix on the 12th of May, 1904, and the translation of the same.

I consider it my duty to state that of those documents the only one which was submitted in due form to the jury and which was taken into consideration in the judgment rendered, was the letter addressed by Mr. Kent to Mr. Dix, or in other words, Document No. 5.

The complaint, or document No. 1, had its effect on the initiation of this case in the Justice of the Peace Court. In this District Court, as the first document, as the document which was the basis of the prosecution, an information duly sworn to by the Fiscal of the District was filed.

Document No. 2 or the letter written by the Assistant Attorney General to the Justice of the Peace is really found among the documents in this case, but of that document, to the best of my recollection, nothing was said during the proceedings in this case.

61 Documents No. 3 and No. 4, or the declarations of Harry and Dix, before the Fiscal are also found among the papers in this case, but in my opinion unduly so. Their declarations before the Fiscal, taken privately by him in order to draw up his information and take his oath to the effect that there is just cause for filing such information. Of the first of these declarations, as appears from the Bill of Exceptions, something was said during the trial, but it was exclusively to comply with the requirements of

sections 243, 244 and 245 of the Code of Criminal Procedure. Said declarations were not submitted to the jury, nor were they taken into consideration in rendering the judgment.

The witnesses Harry and Dix testified before the jury, after being sworn, presented by the Fiscal, examined by him, and fully cross-examined by the defence. With great consideration,

(Signed) EMILIO DEL TORO,
Judge of the District Court of San Juan.

Filed in my office on this 20th day of September 1905.

(Signed) A. F. CASTRO,
Secretary of the Supreme Court of Porto Rico.

Certificate of Sec. of Dist. Court.

I, the undersigned Secretary of the District Court of the judicial District of San Juan, Porto Rico, hereby certify: that among the documents on file in the office of the Secretary under my charge in the case prosecuted by the People of Porto Rico *vs.* James E. Kent.—Embezzlement, appear the following, which literally copied are as follows:

Document No. 1.

In the Justice Court of the San Francisco District of San Juan, Porto Rico.

In the Name and by the Authority of the People of Porto Rico.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

Before me, the undersigned authority, on this day personally appeared B. R. Dix, a credible witness, who, after being duly sworn by me on his oath, deposes and says that on or about the ninth day of May, 1904, he the said B. R. Dix, was the Treasurer of the Union Club of San Juan, Porto Rico, an organization established for the recreation of its members; that on said last date and previous
62 thereto, the affiant as such Treasurer, entrusted the keeping of books and accounts of his office to one James E. Kent, and also authorized the said Kent to collect all fees dues and other moneys owing to and belonging to said Club, to be covered into the treasury of said Club; that on the date aforesaid the said Kent within the Judicial District of San Juan, Porto Rico, did unlawfully and fraudulently embezzle and appropriate to his own use and benefit the sum of $1896.77 belonging to said Club, and collected by him from the members of said Club, and others under the authority granted to him by the affiant; against the statutes — such cases made

and provided, and against the peace and dignity of the People of Porto Rico.

(Signed) B. R. DIX.

Sworn and subscribed before me this fourteenth day of May, 1904.

(Signed) JOSÉ BAZÁN,
Justice of the Peace of the San Francisco District of San Juan, Porto Rico.

Document No. 2.

OFFICE OF THE ATTORNEY GENERAL OF PORTO RICO,
SAN JUAN, *May 17th,* 1904.

Mr. José Bazán, Justice of the Peace of San Francisco, San Juan, P. R.

MY DEAR SIR: Do me the favor to summon the following witnesses for the prosecution in the case against James E. Kent, to wit: Mr. B. R. Dix, L. H. Harry, W. H. Hylan, A. A. Smith, H. B. McCormick (Rio Piedras).—Prosecuting Attorney Rossy has several cases set in the District Court for Thursday morning, but he will go to your Justice Court in the afternoon of that day to assist you. For which reason I request you to postpone the investigation of the case until two o'clock in the afternoon of the day above mentioned, and that the witnesses for the prosecution be summoned to appear on that day and hour. With all consideration.

(Signed) FRANK FEUILLE,
Assistant Attorney General.

Document No. 3.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

In San Juan, P. R., on the 21st of May 1904, before the District Attorney, after being sworn, Mr. L. D. Harry testified that: on the 10th day of May of this year he was charged by Mr. Dix with the duty of examining the accounts of the Union Club in view of the irregularity in the same, for which purpose the necessary books and papers were delivered to him: that he commenced his investigation and on the following day Mr. Dix had the accused come into his presence in order that he might be present at the investigation and that he should assist in ascertaining the amount misappropriated; that the said accused indicated to them how the investigation should be made in order to reach the desired end, and by that means ascertain that the fraud existed in the accounts of the Club: that during the time which that examination lasted he asked the accused what he had done with that money and that the accused replied that

he could not say for what purposes he had employed it because he only remembered of one amount of $300 which he had sent to the United States as a loan to a friend: that he never said who that friend was, and as the witness asked him if he could have that sum returned the accused replied that he could: that in order to make that investigation a new book was opened entering therein all of the names of the members with the amounts which up to that date they should have paid, entering also the amounts daily taken
63 in by the Club, of the expenses had there by the members, taking also the amount which should have been received for the sale of the ticket books for daily expenses by the members of the Club; that in this list there was also included a balance of $116.45 from the Yacht Club: thereupon the expenses were entered for which there were receipts, which expenses consisted in what had been paid to the contractor for building the house, to the architect, the premium for fire insurance, furniture of the house, payment for necessary employees and other necessary expenses, and the proper liquidation or balance having been made there should have been the sum of $556.72 in favor of the Club, but instead of having that sum in cash, it had a debit in the Colonial Bank amounting to $1340.05. Adding these two amounts, a total is reached of $1896.77, which is the amount of the fraud.—Read and signed.

(Signed) L. D. HARRY.

Document No. 4.

THE PEOPLE OF PORTO RICO
vs.
J. E. KENT.

SAN JUAN, P. R.

On the 21st of May, 1904 Mr. B. R. Dix appeared before this Fiscal and after having been sworn, testified: that he ratified the complaint filed before the Justice of the Peace of San Francisco, as the contents of the same were true: On the 10th instant, he learned through Mr. H. P. McCormick that the accused was not up to date on his accounts, and that his books were not in good condition, telling him also that he was short from $1000 to $1400 in the funds of the Club, for which he went to the house of the accused in company with Mr. McCormick, where the accused confessed that the defalcation really existed of that sum, and not being able to tell where the money was; because he said he had spent it; that the witness asked him if he had spent that money in his current expenses, or if he had lent it to any person, to which the accused replied that he had only lent $300 to a friend and that the balance he had spent. That in view of that statement he gathered up the books and papers and other documents in the possession of the accused and commissioned Mr. L. D. Harry who is an expert accountant, to make an examination of those accounts in order to ascertain the amount which was really short, and Mr. Harry, after studying the matter informed him that at that time there was about $1700

short, that afterwards when a continued examination was made of those accounts by means of data given him by the accused himself, and by other documents, it was learned that the sum which was short was $1896.77. He read and signed this declaration.

(Signed) B. R. DIX.

Document No. 5.

SAN JUAN, PORTO RICO, *May 12th*, 1904.

Mr. B. R. Dix, San Juan, P. R.

MY DEAR MR. DIX: It is with the deepest humiliation and sincere regret that I have to make you the following confession. You will find upon examining the books and records of the Union Club, which I kept for you, as Treasurer of said Club, that I have received and appropriated to my own use about eighteen hundred and ninety-six dollars and seventy-seven cents, ($1896.77). The method I have employed to — up the full amount of initiation fees and stock subscriptions. I have also used part of the money turned in by the collector for Club receipt- for the Bar, bowling alley, and & also sold (40) forty ($5.00) five dollars ticket books.

I can offer no satisfactory excuse to you for this action, but will say this, that if given thirty days I will make good every 64 cent. There is no use stating that I know the sacrifices you will have to make good the shortage I have caused you, but before God and these witnesses I will make good every cent if I live. Forgive me if you can.

Sincerely, JAMES E. KENT.

Witness:
ALFRED A. SMITH.

And in compliance with the order of the Supreme Court of Porto Rico in its letter No. 862 under date of the 15th instant, this document is issued; consisting of four type-written pages, under my signature and the official seal of the District Court of the judicial district of San Juan, in the City of San Juan, P. R., on this 19th day of September 1905.

(Signed) JOSE E. FIGUERAS,
Secretary of the District Court
of the District of San Juan.

Appeal Set for Hearing.

San Juan, Porto Rico, October 24th 1905.—This appeal is set for hearing on the tenth day of next November, and following working days, at nine o'clock in the morning.—The gentlemen of the Court so ordered, and the Chief Justice affixes his rubric; to which I certify.

[RUBRIC.] (Signed) A. F. CASTRO.

Hearing Took Place.

On the 10th of November the court being composed of the Chief Justice, and Justices Hernandez, Figueras, MacLeary and Wolf, the hearing of this appeal took place, the attorney Nemesio Perez Moris Esq., being present and argued the case, in representation of the appellant, and the Fiscal in the name of the People of Porto Rico, the proceedings being thereupon declared closed, and ready for judgment: I certify.

(Signed) A. F. CASTRO.

65 In the Supreme Court of Porto Rico.

No. 46.

PEOPLE OF PORTO RICO, Respondent,
vs.
JAMES E. KENT, Appellant.

Appeal from a Judgment of Conviction Rendered by the District Court of San Juan.

Opinion by Mr. Justice MacLeary.

SAN JUAN, PORTO RICO, *5th of March*, 1906.

The defendant in this case was accused of a felony, by information duly filed by the District Attorney of San Juan, on the 23rd of May, 1904, charging him with the embezzlement of ($1896.77) One thousand eight hundred and ninety-six dollars and seventy seven cents, money belonging to the Union Club of San Juan, which had been collected from its members and other persons. On the 28th of the same month he was duly arraigned and pleaded not guilty. On the 14th of September 1904, at the conclusion of a trial lasting several days, the jury found him guilty as charged in the information. On the 17th of the same month he was sentenced by the court to three years' imprisonment in the Penitentiary at hard labor and the payment of all costs of the prosecution.

On the same day he gave due notice of appeal. On the 27th of March 1905 a bill of exceptions was duly prepared and presented, by counsel for defendant, to the trial judge, and by him duly signed on the 31st of May following. Defendant was admitted to bail in the sum of two thousand dollars; and on 29th of June 1905 the record on appeal was filed in this court.

After the filing of briefs for both the People and the defendant the case was heard, on oral argument, in this Court, on the 24th of October 1905, and taken under consideration. The volume of
66 the record and the numerous points presented in the bill of exceptions has caused the long delay in the decision which has been unavoidable.

The bill of exceptions sets out forty one separate and distinct errors which are alleged to have been committed on the trial of this cause, those being in some instances subdivided into two or more, reaching in one specification to nine. They will be examined in due course, either in groups or singly, and in such order as appears most logical and convenient.

1st. The defendant demurred to the information on four grounds; to wit:

(*a.*) That the information is bad in that it does not conform to the requirements of section 153 of the Code of Criminal Procedure, because it does not contain a statement of the acts constituting the offence in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended.

(*b.*) That it does not conform to section 73 of the said Code, inasmuch as the facts stated in the information do not constitute the offence of embezzlement.

(*c.*) That it does not conform to section 153 of the said Code inasmuch as there is an attempt to charge more than one offence, to wit:

In the first paragraph thereof the defendant as alleged is charged with the crime of embezzlement.

And in the last part of the information there is said to be an attempt to charge the defendant with the crime of larceny.

(*d.*) That it contains matter, which, if true, would constitute a legal justification or excuse for the offence charged, and because the facts as stated do not in themselves constitute an offence, contrary to paragraph 4 of the said section 153.

67 The defendant's counsel, some days after arraignment, moved the court for leave to withdraw his plea of "Not guilty" and to present the foregoing demurrer to the information which the trial court for sufficient reasons denied. Let us examine the reasons given by the final court for the denial of the motion, which were the following:

"We have duly considered the motion of the accused in this case, that he be permitted to withdraw his plea of "not guilty" and substitute therefor a demurrer to the information.

In this case the fiscal presented his information duly sworn to on the 23rd of May, 1904. Said information was read to the accused in open court on the same date, and the accused asked for time to file his answer through counsel, and the court granted five days for that purpose, at the expiration of which time the accused appeared in court accompanied by his attorney, and pleaded "not guilty." This occurred on the 28th of May, 1904.

On July 21st, 1904, this case was set for hearing on the 2nd day of August on which date the hearing was postponed. The 18th of the present month, or tomorrow, was set then for the hearing. Counsel presenting the motion under consideration has been the attorney of record since the first of August, 1904.

The Code of Criminal Procedure of Porto Rico expressly provides when the accused shall plead. At such time the accused in

the present case pleaded not guilty.. The case was subsequently continued to be prosecuted in accordance with the provisions of said Code, and this is the second time it has been set for trial. The law therefore does not provide that pleading may be withdrawn at the present time and that new allegations may be made. This opinion is based on the logical construction of our Code of Criminal Procedure, and on the work of Bishop, which on page 123 of the 1st Volume of his work on criminal procedure, says:

"Ordinarily under a rule of law or of a court, a demurrer should be made at a fixed period of the trial. If within that period the party should fail to make use of his rights, or if said party should take some other step later on, his right to take an exception must be considered as terminated by waiver."

The law therefore is against the motion."

This ruling of the trial court was not only correct in the disposition made of defendant's motion, but it was based on sound principles well established in our criminal law.

It is very essential in the administration of justice, in the
68 criminal courts of our country, that due order should be observed in all the proceedings, thus safeguarding, within the discretion of the court, the rights both of the accused and of the people. Of course this conformity to settled rules should not be extended beyond the limits prescribed in the statute, nor should the rigidity in their application make the rules of procedure an instrument of oppression instead of a protection against injustice. The provisions of our Code of Criminal Procedure in regard to these matters are eminently just and fair to all parties.

Code Crim. Pro. Title VI, sections 131 to 183.

2nd. The defendant's counsel not being allowed by the trial court to present their objections to the information by way of demurrer, made a motion to quash the same on substantially the same grounds, although couched in different words, as follows:

"1. That the information is bad both in form and in substance.

2. That it does not conform to the requirements of the Code of Criminal Procedure and especially to the requirements of section 153 of said Code.

3. That the offence which it is attempted to charge is not charged.

4. That there are in fact two offences charged.

5. That the defendant is called upon to defend himself against an uncertain and ambig-ous charge; and in fact that he does not know whether he is charged with the offence of embezzlement or that of larceny.

6. That even if all the allegations of the information were proven that still the defendant would not have been proven to have committed any offence.

These objections are a substantial repetition of the grounds set out in the demurrer to the information; and had there been error in refusing to consider the demurrer at the time it was presented to the court, such error would have been cured by the consideration given by the court to this motion made later to quash the informa-

tion. Let us try the information, by the rules laid down in the law, to test its sufficiency.

The information, as presented in the trial court, reads as follows:

69 "In the name and by the authority of the People of Porto Rico.

THE PEOPLE OF PORTO RICO
v.
JAMES E. KENT.

In the District Court of San Juan, on the 23rd day of the Month of May, 1904.

The District Attorney presents an accusation against James E. Kent, a prisoner in the San Juan Jail, for the crime of embezzlement, defined in section 448 of the Penal Code committed in the following manner: B. R. Dix on or about the 9th of May, 1904, was the treasurer of the Union Club, an organization established in the ward of Santurce of this city, for the recreation of its members: that on or about the date above mentioned, Mr. Dix as such Treasurer, entrusted to the accused James E. Kent the duty of keeping the accounts and books of that office, authorizing him also to collect money which from different sources should be received in the treasury of said society, charging him with the duty of turning over such funds to the treasurer, said funds being, the property of the Club: that on or about the date above mentioned the said accused James E. Kent in the Judicial District of San Juan, Island of Porto Rico, illegally and fraudulently withdrew and applied to his own benefit the sum of one thousand eight hundred and ninety-six dollars and seventy-seven cents, which money belonged to the said Club and had been collected from the members thereof and other persons, under the authority which had been conferred upon him by Mr. Dix; this act being contrary to the law in such case provided, and against the peace and dignity of the People of Porto Rico.

(Signed) JESUS M. ROSSY,
District Attorney."

The first and second objections made to the information in the motion to quash it, are that the information is bad both in form and substance not conforming to the requirements of section 153 of the Code of Criminal Procedure in this that it does not set forth the criminal acts in ordinary and concise language, so that a person of ordinary understanding could know what was intended. Reference is made in support of this objection also to sections 71–72 and 73 of the Code of Criminal Procedure.

It has never been the practice in this Court or in the inferior courts of this Island to require the same strictness in criminal pleadings as is required in many of the States of the American Union.

No such requirements were enforced under the Spanish law and when we passed from that system, on the 1st of July 1902, we adopted a more liberal Code of Criminal Procedure than prevails in most of the States of the Continent. Our Codes, embodying the sub-
70 stantive and adjective criminal law, is taken almost literally from the Penal Code of California; and we have been accustomed to make constant reference to the decisions of the Supreme Court of that State when it is necessary to elucidate any obscure phrase or expression or to interpret the general effect of any criminal statute.

Under the well established rule for the construction of statutes we are authorized to presume that the legislature of Porto Rico, in adopting the California Code did so in view of the construction which had been put upon those statutes by the Supreme Court of that State. Where a statute is adopted from the Code of another State it is presumed to have been taken with its meaning as judicially determined in the State from which is was adopted. So statutes originally enacted in another state, when adopted, are deemed to have been reenacted in view of the settled construction given them in the state from which they are copied.

Henrrietta Mining & Milling Co. *v.* Gardner, 173 U. S. 130;
Brown *v.* Walker, 161 U. S. 600;
McDonald *v.* Hovey, 110 U. S. 628,
Cathcart *v.* Robinson, 30 U. S. 279,
Pennock *v.* Dialogue, 27 U. S. 16,
Morgan *v.* Davenport, 60 Tx. 230,
Munson *v.* Hallowell, 26 Tx. 475,
Trigg *v.* State, 49 Tx. 645,
Snoddy *v.* Gage, 5 Tx. 106,
Brothers *v.* Mundell, 60 Tx. 240,
Hess *v.* Pegg, 7 Nev. 23,
Carney *v.* Hampton, 3 T. B. Mon. 231,
Botanico-Med. College *v.* Atchison, 41 Miss. 188,
Jessup *v.* Carnegie, 80 N. Y. 441,
Leonard *v.* Columbia, N. Co., 84 N. Y. 48,
Marqueze *v.* Cladwell, 48 Miss. 23,
Ingraham *v.* Regan, 23 Miss. 213,
Parramore *v.* Taylor, 11 Gratt. 242,
People *v.* Irvin, 21 Wend. 128,
Kirpatrick *v.* Gibson, 2 Brock. 388,
Harrison *v.* Sager, 27 Mich. 476,
Daniels *v.* Clegg, 28 Mich. 32,
Greiner *v.* Klein, 28 Mich. 17,
Attorney General *v.* Brunst, 3 Wis. 787,
Pike's Estate 45 Wis. 391,
Sedgwick on Cons. Stat. & Cons. Law, sec. 363,
Smith's Com. on Stat. & Const. Law, sec. 634,
Sutherland on Stat. Cons. 337.

Our Code of Criminal Procedure contains a distinct limitation on the construction which we are authorized to place upon

71 criminal pleadings in determining their sufficiency. Section 66 of the said Code reads as follows:

"All the forms of pleading in criminal actions and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code."

The objections made by defendant's counsel to the information, and which we are now considering, fall under sections 71, 72, & 73 of the Code of Criminal Procedure. Rev. Stat. pp. 638 & 639. These sections of the statute contain the requisites of an information, which should be followed by the fiscal in preparing such documents; providing that the facts stated in the information must constitute an offence triable by the court. If the accusation conforms to these sections it is ordinarily sufficient. Comparing this information with the statutes it appears to be drawn correctly; and it requires the defendant to plead to it and stand his trial.

The third objection states specifically that the offence which it is attempted to charge is not charged, evidently meaning thereby that the facts stated in the information do not constitute the offence of embezzlement, as required by section 73 of the Code of Criminal Procedure. The crime of embezzlement is defined in sections 445, 446, 447 & 448 of the Penal Code of Porto Rico as follows:

"SECTION 445. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted."

"SECTION 446. Every officer of Porto Rico, or of any municipality, city, or other civil division, and every deputy clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, attorney, or agent of any association, society or corporation (public or private) who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

Section 447 has relation to carriers only and need not be quoted here, not being applicable in any point of view to this case.

72 Section 448 says:

"Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator or collector, or person otherwise instrusted with or having in his control peroperty for the use of any other person who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

Reference is expressly made to section 448 in the information which alleges in substance that Dix was the Treasurer of the Union Club and as such entrusted to Kent the keeping of the Club Books and the collection of its moneys requiring him to turn them into the treasury of the Club, and that Kent fraudulently took and applied the said money to his own use, to the amount of ($1896.77) one thousand eight hundred and ninety-six dollars and seventy-seven cents, which money belonged to the Union Club and had been collected

by Kent under authority from Dix the treasurer; ending with the usual formula.

Section 448 of our Penal Code is entirely similar to section 506 of the Penal Code of California; and under that statute a case arose in which the Supreme Court of that State took under consideration an indictment for embezzlement very much like the one before us now. It was in April 1897, and the case is found in Volume 116 of the California Reports. In this California case a guardian was charged with embezzling the property of his ward, and the indictment stated that "the defendant being then and there instrusted with and having in his control the sum of $4,362 in lawful money of the United States, * * * as guardian, trustee, and agent of one Louis Litchtneger, an insane person, for the use and benefit of said Louis Litchneger, then and there the property of and belonging to said Louis Litchneger, did then and there, to wit, at said city and county of San Francisco, on or about said twenty-eighth day
73 of May, 1895, willfully, unlawfully, feloniously, and fraudulently embezzle, convert, and appropriate the same to his own use, contrary, etc."

This indictment was held sufficient on an objection almost identical with the one made here We regard the decision rendered in that case as conclusively settling this point, against the accused.

People *v.* Page, 116 Calf. 386.

The fourth and fifth objections to the information are that it attempts to charge two offences, to wit: embezzlement and larceny; and that the charge contained therein is uncertain and ambiguous, contrary to the second paragraph of section 153 of the Code of Criminal Procedure.

Embezzlement is regarded by many writers on criminal law as a species of theft or larceny, the difference being that the articles, goods or property in the case of embezzlement are lawfully in the possession of the defendant, and in larceny they are taken from the possession of another. In both cases they are unlawfully appropriated to the use and benefit of the accused. The information, when fairly construed according to the proper import of the words used therein, charges the offence of embezzlement only, and not that of larceny; and it can not be held liable to the objection of duplicity made against it by defendant's counsel.

The last objection urged to the information is that it contains matters which if true constitute a legal justification of the offence charged; and because the facts do not in themselves constitute an offence. This objection is not sound. It cannot be maintained that, because Dix was the treasurer of the Union Club, and as such entrusted to the defendant the keeping of his books and accounts and the collection of moneys belonging to the Club, at the same time charging him with the duty of turning such funds over to the treasurer, the agent or servant Kent had the right to appropriate
74 the money to his own use or could he be justified in so doing. This is the very act prohibited by law, and which under our statute constitutes the crime of embezzlement. It is neither excused

nor justified by any law known to us, and, if we correctly understand the force of language, it constitutes an offence punishable under the Penal Code of Porto Rico.

It was further maintained that inasmuch as the moneys, alleged to have been embezzled, belonged to the Union Club, and were entrusted by Dix, and not by the Club, to Kent, the appropriation of them by the latter to his own use is not embezzlement. In other words that the funds must have been entrusted by the owner to the accused, and if they passed in transit through the hands of a third person the offence cannot be classed as embezzlement. An examination of section 448 of the Penal Code under which this information was drawn, will show this contention to be entirely fallacious. The idea probably originated in the translation of the word embezzlement into the Spanish language by the term *abuso de confianza* (Abuse of confidence.) Perhaps a better word by which to translate the term embezzlement into Spanish would be *peculado,* or *estafa.* Be that as it may, we are following the English text of the Code. The agent is merely required to have within his control the money misappropriated and it matters not by whom it was entrusted to him. The same view of the law is sustained by an examination of sections 445, and 446 of the Penal Code, which have been heretofore copied.

3rd. The counsel for the defendant then presented a plea in abatement alleging:

"That the court is not properly constituted, nor in accordance with law, and therefore has no jurisdiction over the person of the said defendant.

Def-ndant says that said Court in its organization is not in accordance with the Act of Congress of April 12, 1900, which
75 requires that the jurisdiction of said Courts and the form of procedure in them, and the various officials and attaches thereof respectively shall be the same as defined and prescribed in and by said laws and ordinances and said General Orders Nos. 118 and 195 until otherwise provided by law.

Defendant further says that said General Order No. 118, section 10, provides that each District Court "will be composed of three judges, one of whom shall be presiding judge, and who shall constitute a bench for civil and criminal business."

Defendant further says that said court as now constituted does not consist of three judges as provided in said General Order and in said Act of April 12, 1900, but consists of one judge, which said judge has been improperly and illegally appointed, and has not jurisdiction nor authority to act as Judge over the person of said defendant.

Defendant further says that the said Court has jurisdiction only as granted to it by the Act approved March 10, 1904, of the Legislative Assembly of Porto Rico, but he states that said act does not confer by its phraseology, either directly or indirectly any jurisdiction of any kind whatever, over the person of this defendant or the person of any other defendant who might be brought before the said Court.

Defendant further says that he has been informed and verily be-

lieves that the Honorable Juan Morera Martinez, President of the District Court of San Juan as properly constituted and continued in existence by the said act of Congress of April 12, 1900, has never resigned nor has been removed from the office of said President of said Court, and that he has not been legislated out of said office. That the said Juan Morera Martinez is still President of the District Court of San Juan, and should, under the laws of Porto Rico, act in his official capacity at the trial by the jury of this said defendant.

Deponent further says that the appointment of the Hon. Emilio del Toro was not, could not, in itself deprive the said Juan Morera Martinez of his rights and his duty to occupy said Bench, in the said San Juan District Court; that the appointment of said Emilio del Toro is unlawful and illegal, and contrary to the spirit and intent of the said Act of Congress of April 12, 1900.

Defendant further says that he has been and would be greatly prejudiced by the said unlawful and illegal organization of the said District Court, for that under the laws of Porto Rico now in force and in force at the time of the passage of the said Act of Congress of April 12, 1900, it was a privilege and right of defendant charged with a felony to have questions of law determined by three judges.

Defendant for further plea says that he is a citizen of the United States of America, residing in Porto Rico, and that he has been deprived of his right to an indictment by Grand Jury, and has been forced to go to trial for felony without an indictment by
76 a Grand Jury, but by presentment by a Prosecuting Attorney on information.

Wherefore, the said defendant prays judgment, and that the proceedings against him be abated, and that he be discharged."

This plea in abatement was promptly overruled by the Court and defendant excepted. Let us examine the questions thus presented.

Of course the proposition set forth in the foregoing plea in abatement involved the construction of the Organic Act, commonly called the Foraker Law. That Act of Congress serves as a constitution for Porto Rico, and any law passed by the Legislative Assembly of this Island which is in conflict with the Organic Act is on that account a nullity. Under the Foraker Law the District Courts of Porto Rico were continued as they existed at the date of the passage of that Act, the 12th of April, 1900, but at the same time, in section 33 of the Organic Act the Legislative Assembly was given "authority to legislate from time to time as it may see fit with respect to said Courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and attaches for each, their jurisdiction, their procedure, and all other matters affecting them."

This power of the Insular Legislature to alter, modify or repeal the general orders mentioned in section 33 of the Organic Act, and the Laws referred to in section 8 of the same Act, is also plainly conferred by section 15 of the same Organic Act which reads as follows:

"The legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify or repeal any law or

ordinance, civil or criminal, continued in force by this Act, as it may from time to time see fit."

The whole question in a nut-shell can be reduced to this: Does the language above quoted from section 33 refer to the District Courts of Porto Rico, which were and are the trial courts having
77 general jurisdiction over all felonies committed in the island?

It is said in the former part of the same section referred to that "the jurisdiction of said courts and the form of procedure in them, and the various officials and attaches thereof respectively, shall be the same as defined and prescribed in and by said laws and ordinances, and said General Orders, numbered 118 and 195, until otherwise provided by law." Does this mean until otherwise provided by law such as may be enacted by the Legislative Assembly of Porto Rico, or a law to be passed by the Congress of the United States? We have heretofore held in numerous cases, incidentally and directly, that this expression quoted from the Organic Act refers to laws which might be passed by the Legislative Assembly of Porto Rico, which under the first extract made from the Organic Act as above cited, gives authority to the Legislative Assembly to legislate from time to time as it may see fit with respect to said Courts.

And indeed it could not reasonably be held to apply to laws passed by Congress; for in such a construction the expression "until otherwise provided by law" would be useless and a mere waste of words. The Congress of the United States had and still has the power and the constitutional right to alter and amend the Organic Act of Porto Rico, and did not need to reserve such right or power in the act itself. Taken in conn[illegible] with section 15 of the same act there can be no reasonable d[illegible]ot that the law referred to was an enactment of the Insular Legislature.

The expression "said courts" is used in both of the extracts from section 33 of the Organic Act, above set out, and according to our view plainly refers as well to the District Courts of the Island as any other inferior courts. We think the construction which the defendant's counsel appears to put upon the language of this section
78 is entirely too rigid, and would thwart the purposes of Congress in pasing the act to provide a civil government for Porto Rico.

And aside from all that has been said in the foregoing paragraphs in regard to the Judiciary Act of the 10th of March 1904, we may very well consider the fact that it was passed nearly two years ago, and has been in active operation in this Island for something like twenty months, and during that time no effort has been made by any one to secure its annulment or revocation by the Congress of the United States. Although Congress ever since the date on which this act was passed, and ever since the American Government acquired sovereignty over this island, has had the power and still has, to revoke or annul all laws passed by the Insular Legislature, it has not attempted in a single case, so far, to exercise that authority. Thus by its nonaction in the premises Congress may very well be said to have tacitly approved the Judiciary Act just as much as if a

special act had been passed making the same changes in the constitution of the courts of this island as were effected by that insular statute.

The Organic Act was not intended to go further than to lay down general principles upon which such a government should be constructed and carried on; and it certainly was not intended to permanently adopt and continue in operation the courts and tribunals of Porto Rico as established by the General Orders nos. 118 and 195 of the American Military Government just as they were constituted at that time, but it was, as it clearly appears to us, certainly intended to leave it to the Legislative Assembly to make such changes in the District and inferior courts, as to the jurisdiction and the
79 number of judges and other incidental matters, as might be wise and expedient, from time to time, as civil government in the Island might progress in its development. We must accordingly hold that the District Court of San Juan at the time of defendant's trial, was properly constituted of a single judge and had jurisdiction of such felonies as that with which the appellant was charged.

This same question was raised in the *Habeas corpus* case of Francisco Dones *Ex Parte,* decided by us in accordance with this view, on the 14th instant. Reference may be made, to the opinion in that case for further discussion and a citation of authorities on this point.

As to the objection which defendant makes, in the same plea in abatement and in the exemption taken to the ruling made thereon on account of the trial given him in the District Court of Porto Rico; claiming that he is a citizen of the United States of America, and cannot be tried for a felony unless indicted by a Grand Jury, we have to say that this position has no foundation whatever in law, constitutional or otherwise.

In discussing this question we need not consider the proposition that "The Constitution follows the Flag," more or less closely, nor the decisions made in regard to the extent in which the protection of the Constitution covers this Island or the other insular possessions of the American Government. For the purpose of this discussion it may be conceded that the rights guaranteed in the 5th Amendment to the American Constitution are enjoyed to their full extent by all the inhabitants of Porto Rico, natives or continentals. Article 5 of the Amendments to the Constitution of the United States certainly provides that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment by a grand jury, except in the case arising in the land or naval
80 forces, or the militia when in actual service in time of war or public danger. This amendment to the Constitution has been repeatedly held by the Supreme Court of the United States and other Federal Courts, to apply only to United States Courts, and it has no application to State Courts on the Continent.

Twitchell *v.* Com. 74 U. S. 324.
Barron *v.* Baltimore, 32 U. S. 243.
Fox *v.* Ohio, 46 U. S. 434.
Smith *v.* Maryland 59 U. S. 76.
Withers *v.* Buckley, 61 U. S. 90.
Walker *v.* Sauvinet, 92 U. S. 92.

It has also been repeatedly held by the highest judicial tribunal that the courts of the several territories, organized temporarily for local government, are not United States Courts within the purview of this section.

Clinton *v.* Englebrecht 80 U. S. 434.
Hornbuckle *v.* Toombs 85 U. S. 648.
Good *v.* Martin, 95 U. S. 98.
McAllister *v.* United States, 141 U. S. 184.

In our opinion the insular courts of Porto Rico fall under the same category, and the only Court in Porto Rico which requires the services of a grand jury is the United States District Court for the District of Porto Rico. That court has no jurisdiction of the case at bar. It has been well said by the highest authority, that "A Grand Jury, whether of the State or of the United States, is empaneled and sworn to inquire into and present offences against the government only, under whose authority it is summoned. (Story on the Constitution, section 1784.) The Grand Jury, summoned and empaneled under the authority of a State, is the only appropriate body to inquire into any offence against the State, and to find or to ignore an indictment therefor. The duty of the grand jury, attending a court of the United States, is limited to inquiring into and presenting offences against the laws of the United States; and its proper advisers in matters of law, are the court and
81 the attorney of the United States."

Virginia *v.* Paul, 148 U. S. 119 & 120.

It has never been held by any court or maintained by any respectable authority, with which we are acquainted, that an American citizen, in his travels around the world, or sojourning in foreign lands, carries with him all the rights guaranteed by the Constitution of his native land, and that, no matter where he may be or what crime he may commit, he is entitled to be charged therewith by a grand jury, whether such a body is provided for by the laws of the country where he is accused or not.

It would be a strange doctrine indeed that a citizen of the United States resident in Porto Rico should have special privileges over and above all other persons, either natives or foreigners resident here, simply because he is a citizen of the United States. And indeed the present claim made by the defendant, is to privileges which he would not have in New York, Pennsylvania, Texas, California, or any other State of the American Union. To state the proposition in its nakedness is sufficient to refute it.

4th. An objection is made to the empaneling of the jury on the ground that it was summoned and organized by a court without authority to act. This constitutes the 4th exception in the bill contained in the record. This is merely presenting the same question as that set out in the 3rd exception, under a different form, and its decision must abide the result of the one reached in the former. As we have held the District Court of San Juan, as at present con-

stituted, to be a legal Court and to have jurisdiction of such criminal cases as the one at bar, it necessarily follows that the organization of the jury empaneled therein is not subject to the objection stated. The trial court had full authority to summon and organize the Jury which tried the defendant, and it was properly constituted.

5th. The next exception is based on the following
82 grounds. A challenge for cause was made to a juryman, one Otero, on the ground that he could not read nor write. This challenge was overruled by the court. After this ruling by the court the juryman was challenged by defendant peremptorily; but as the panel was finally filled without the exhaustion of defendant's peremptory challe-ges this objection is not available to him on appeal and needs no further notice. As jurymen in California are summoned and empaneled under a similar statute, we will refer to a few decisions from the Supreme Court of that State which sustain this view of the matter.

People *v.* Gatewood, 20 Calf. 147.
People *v.* Gaunt, 23 Calf. 156.
People *v.* Well, 40 Calf. 268.
People *v.* McGungill, 41 Calf. 429.
People *v.* Durrant, 116 Calf. 179.
People *v.* Winthrop, 118 Calf. 85.

6th. Objection was made to the testimony of the prosecuting witness Benjamin R. Dix, being received or admitted, on the ground that it appeared from the information that he was an accomplice or an accessory to defendant in the offence charged, and should be allowed to testify only in corroboration of other evidence. This is reversing the rule in regard to the testimony of accomplices. How is it possible to corroborate the testimony of any witness until it has been given to the court or Jury! In order to corroborate there must be something with which the corroborating testimony can agree. In order to measure anything a rule of measurement must be used. Every comparison involves the use of a standard to determine points of agreement or difference. The proper method to follow in receiving the testimony of an accomplice is to examine him like any other witness, admitting his testimony subject to corroboration. If there is no corroborating evidence then his testimony should be disregarded by the Jury, under proper instruction from

the Court. The objection that the witness was an accom-
83 plice in the crime charged against defendant may be urged to the effect of the evidence but not to its admissibility.

People *v.* Grundell, 75 Calf. 301;
People *v.* Terry, 84 Calf. 31;
People *v.* Armstrong 114 Calf. 570.
People *v.* Kunz, 73 Calf. 313;
People *v.* Cloonan, 50 Calf. 449;
People *v.* Cleveland, 49 Calf. 577.

Had Dix therefore been an accomplice, which is not shown in the record, his testimony should have been received subject to cor-

roboration to be weighed by the Jury in considering its effect. This was a question for the Jury under proper instructions from the court; and the testimony could not properly have been excluded for the reasons presented by defendant's counsel.

It might as well be stated here as elsewhere that there is nothing whatever in the record of this case to justify, or even to excuse or palliate, the violent attacks made upon this witness in the printed brief filed in this case and in the oral discussion indulged in by defendant's counsel on the hearing before this court. The reputation of Benjamin R. Dix, as an honest man and a good citizen, remains as bright and fair today as it did when this prosecution was begun.

7th. There were many objections made, in the course of the trial, to the testimony of Mr. Dix as it was given; these being embraced in exceptions 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 34. They will all be considered together.

The trial court must be allowed great latitute, within the limits of the statute on that subject, in the exercise of the discretion necessarily confided to it in the admission of exclusion of evidence during the progress of the trial. Any objections, made to the evidence admitted or to the exclusion of such as is offered, should be clear and distinct, and the bill of exceptions setting forth the ruling of the court should plainly present the principle of law which has been violated by the court in the ruling of which complaint is made. Otherwise this court cannot revise the ruling of the court below. It must further appear that the party complaining was prejudiced in some way by the ruling made by the trial court or the judgment cannot be reversed for such error. See Laws of 1905, p. 10. As it does not appear that the rights of the defendant were in any respect injured by any ruling made in regard to the testimony of ... witness Dix, any error which may possibly have been committed on which the exceptions mentioned above are based, must be held to be harmless, and would not affect the judgment rendered.

84

8th. The 23rd. exception, presented in the bill was in regard to the admission of a letter written by Kent to Dix on the 12th of May and generally, during the progress of this trial in this court and the court below, called a *confession*. In fact it is so denominated in the written paper itself.

Preliminary to its introduction, four witness-, Dix, Harry, Dexter and Kent, testified as to the circumstances under which it was signed and as to promises which it was claimed were made to defendant as a condition to the signing and delivery of the same. The confession reads as follows:

"SAN JUAN, PORTO RICO, *May 12th*, 1904.

Mr. B. R. Dix, San Juan, P. R.

MY DEAR MR. DIX: It is with the deepest humiliation and sincere regret that I have to make you the following confession. You will find upon examining the books and records of the Union Club that I kept for you, as Treasurer of said Club, that I have received and

appropriated to my own use about eighteen hundred and ninety-six dollars and seventy-seven cents, (1896.77). The method I have employed to keep this from you is by failing to charge up the full amount of the initiation fees and stock subscriptions. I have also used part of the money turned in by the Collector for Club receipts for the Bar, bowling alley and also sold (40) forty ($5) five dollars ticket books.

I can offer no satisfactory excuse to you for this action,
85 but will say this, that if given thirty days I will make good every cent. There is no use stating that I know the sacrifices you will have to make to make good the shortage I have caused you, but before God and these witnesses I will make good every cent if I live. Forgive me if you can.

Sincerely, JAMES E. KENT.

Witness:
ALFRED A. SMITH."

The question of the admission or exclusion of this letter is one of the most important in this case; since if it was properly taken into consideration by the jury no further evidence of the defendant's guilt need to have been sought for or relied on by the Jury in making up their verdict.

As this statement furnishes the main point of contention in the case as presented in this court, some elaboration in discussing the general doctrine of confessions may be allowed. In former cases this court has announced with some care the general American doctrine on this subject, and quoted from standard authors, like Greenleaf and Cooley, the principles which Courts should follow in the consideration of confessions of the accused when offered in evidence. Reference may be made in this connection to the two opinions delivered in the case of Francisco Rivera, bearing date of the 25th day of June 1904, and the 9th day of December 1905. In that case the confession objected to was a verbal one, made to an officer while the defendant was under arrest and in that respect different and more liable to exclusion than the one now under consideration; yet it was nevertheless admitted. But the zeal and earnestness with which the matter has been urged upon our attention may justify an entirely new and more extensive examination of the principles and authorities which should govern in cases of this nature.

The protecting ægis which the common law throws around the life and the liberty of the citizen has long been the boast of English-
speaking people throughout the world. The rack and the
86 thumbscrew have for centuries been banished from their courts of justice. It was when our government was founded in 1776, a well established principle of the common law that no person accused of crime could be compelled to give evidence against himself. Forcing a man to be a witness against himself is contrary to the fundamental principles of a republican government. This great principle was deemed so important by the founders of our Republic that it was incorporated into the Bill of Rights, contained in the original Amendments to the Constitution proposed and

adopted almost simultaneously with that great charter of our liberties, the National Constitution itself. The language reads: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law." See the 5th Amendment to the Constitution. This is the foundation of all laws and the basis of all judicial decisions guarding the rights of the accused in the admission of confessions to be used against him in a trial for crime. The same prohibition that is found in the fifth amendment to the Constitution of the United States forbidding the compulsion of any person to give evidence against himself is reproduced in the 7th section of our Code of Criminal Procedure. Compulsion is the key note of the prohibition. If there is no compulsion the confession does not fall with-this constitutional inhibition.

The admissibility of this paper as a confession depends on the fact of its having been entirely voluntary. This question must be determined by the evidence which we will rehearse in a condensed form.

B. R. Dix, to whom the letter was addressed, testified in effect as follows: that he took the document to the house where Kent lived;
that Kent read the letter before signing it, and that there was
87 a short discussion between them in regard thereto; that Kent
asked if he wished to use the document to prosecute him before the courts, and that he (Dix) replied that the books and documents of the Union Club were in such a condition that they would convict him before any court; that he never promised Kent not to use the letter against him; that he promised Kent nothing; that he does not remember whether Kent, at the time he signed the letter, was employed in the Treasury Department, as he does not remember the date on which he was discharged; that he was employed in that Department until discharged by the Treasurer, and had been for several years prior to that time; that he was a book-keeper or assistant book-keeper; that Kent's object in signing the document is clear on the face of the same; that Kent had said that he wished to do all he could to help him (Dix) and that he presumes that he signed it hoping he (Dix) would be a little easier on him; that at the time the document was signed he did not promise Kent to be easy on him, but that he did make such a promise when Kent offered to return the money if he would wait on him three weeks until he could write to the States, which occurred before the document was signed; that he had promised Kent, on the advise of counsel, that if he would return the money he would not prosecute him; that Kent evidently signed the letter in the hope that he would be dealt with more considerately, and would be assisted to get out of the trouble, and also, possibly, to protect him (Dix); that the document was written on the 8th, by witness, but not being able to obtain the signature on the same day, he changed the date to that on which it was signed; that as already stated, he wrote the letter, couching the same
in the language used by Kent in a personal conversation
88 with him; that probably the same words used in the letter
were expressed in the confession made in the presence of Mr.

McCormick, that in view of the fact that Kent had not been arrested, and fearing that he would leave the Island, he wrote the letter, probably in the very words used by Kent, and took it to the latter personally at his house, showed him the document and that he read it; that he told Kent he wished him to sign it, to which the latter seemed willing; that before signing, he required him to call a witness to his signature, which Kent did, personally calling a friend with whom he lived, and both, Kent and the witness, who was Alfred A. Smith, signed the document, the former as his confession and the latter as witness; that he knows the two signatures at the bottom of the letter are those of Smith and Kent, because they both signed in his presence, in Smith's house, where Kent was living; that he does not remember whether the signatures where attached before or after dinner, but that it was after office hours; that he does not know where Mr. Smith is; that he left the island and went to Panamá, and that he later heard that he was in New Orleans.

Mr. L. D. Harry testified in substance as follows: that the two signatures appearing at the end of the document which was handed him were those of James E. Kent and Alfred A. Smith; that he knows this to be a fact, because he knows Kent's signature, but about that of Smith he is not sure; that he has not seen Smith's signature many times, but he is sure about Kent's signature.

Frank H. Dexter Esq. testified substantially as follows: that he was at one time temporarily Kent's counsel; that he accompanied Mr. Kent when the latter went to see Dix; that he had never before seen the document (which was presumably) handed him on the witness stand for inspection; that something was said in the
89 conversation referred to in regard to a document; that the conversation was in regard to a written confession; that the persons present when the conversation took place were Dix, Kent and the witness, and during the course of the conversation reference was made by Kent to a confession, complaining to Dix that he was not carrying out his promises; that Dix then showed his willingness to carry out the promise; that he as counsel for the accused, believing that the confession had not being voluntary, and that it was irregular and should not be used against the accused, and that as it had been made under promise of being relieved from all criminal responsibility, spoke to Dix and told him that he thought that document ought not to be used against the accused; whereupon Dix replied to witness that he intended to fulfill his promise to Kent, but that there was something in the manner in which — expressed himself from which witness gathered that Dix should not retain him (Kent) in his position, and in view of the fact that proceedings had already been begun which Dix could not control, that the latter would necessarily be governed by future developments. To questions put by the Fiscal witness testified that he did not remember the date on which the conversation occurred, but that it occurred after Kent's arrest; that he can only say that the words used by Dix to him were somewhat reserved; that in the conversation reference was made to a confession of guilt made by Kent; that

Dix mentioned a written confession which he had in the iron safe; that this was a few days after the arrest of Kent; that he could not say positively that that document contained the confession referred to because he had never seen the document until this moment, but that the contents of the document and the subject of the conversation are substantially the same.

The defendant Kent, in his own behalf, testified in brief
90 to the following effect: a document being exhibited to the defendant and he being asked who wrote it, replied that it was written by B. R. Dix and signed by himself; that Dix went to his residence on a Thursday (the 11th or 12th) and was walking up and down in front of the door, while someone went up stairs; that Dix stated that he had a document in his pocket which he desired him to sign; that he then turned to Mr. Dix and said: "Mr. Dix do you not understand that to sign such a paper as that would be a fatal admission." That Dix then stated that he did not intend to make use of the document under any consideration; that a conversation of four or five minutes duration, then ensued before he signed the document, in which conversation Dix told him that his reason for wishing to have the document signed was that in case the defendant should acquire any property in the future, after this question should have been adjusted, he would have something to show, and his promise was that if he should sign the document he would not institute proceedings against him; that he signed the document because if the circumstances connected with the matter were such that if they should come to public knowledge would be more prejudicial than signing the document two or three times more than appeared; that the promise made by Dix was that if he would sign that document the proceedings instituted against him would be stayed; and that he signed the same simply to stop proceedings where they were then; that this was not done until Saturday 14th; that he was present at the conversation mentioned by Mr. Dix; that he recognizes the signature of Mr. Smith; that Smith did not read the document; that when he came into the room defendant asked him to sign in witness of his signature; that his reason for asking Smith to sign was that Dix insisted on a witness to his signature;
that he does not know whether proceedings can be stopped
91 at the will of the injured person or not, but that the proceedings had not yet commenced when he signed; that this took place on Thursday and the arrest was not made until Saturday; that the document was given under the promise that proceedings would be stayed; being asked if proceedings had been commenced, he replied that he was told that the matter was known to only three persons; that the press had said nothing until the following Saturday. This is the substance of all the testimony bearing on the circumstances under which the confession was made. It is well to keep clearly in mind what a confession really is, as that term is used in our Criminal Law. No better method of fixing this point in the discussion can be taken than by referring to that standard lexigographer Bouvier in the volumes so ably edited by Dr. Francis Rawle.

Botanic-Med. College *v.* Atchinson, 41 Miss. 188,

Bouvier defines a *confession* as follows:

"CONFESSION.—*In Criminal Law.*—The voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same.

An admission or acknowledgment by a prisoner, when arraigned for an offence, that he had committed the crime with which he is charged.

Judicial confessions, are those made before a magistrate or in court in the due course of legal proceedings.

Extra-judicial confessions are those made by the party elsewhere than before a magistrate or in open court.

1 Bouvier's Law Dictionary, p. 387 and cases there cited.

Of course this paper if it is classed as a confession at all must be regarded as an extra-judicial one. Having this testimony and the definition given in view let us examine the judicial decisions in regard to the subject of confessions. The United States Supreme Court has laid down the law in regard to the admission in evidence of confession in criminal cases as set forth in the following leading cases.

Mr. Justice White in the opinion handed down by him
92 in the Bram case uses the following language:

"This was an indictment for murder alleged to have been committed on an American vessel on the high seas. After the crime was discovered, Brown, a sailor, was put in irons, and the vessel was headed for Halifax. Before it reached there Brown charged Bram with the commission of the crime, saying that he had seen him do it. Bram was then also put in irons. On the arrival at Halifax, Power, a policeman and detective in the government service at that place, had a conversation with Bram. Bram was indicted at Boston for the commission of the crime, and on his trial Power was offered as a witness for the government. He testified that he made an examination of Bram, in his own office in the city hall at Halifax, when no one was present besides Bram and himself; and that no threats were made in any way to Bram, nor any inducements held out to him. The witness was then asked: "What did you say to him and he to you?" To this defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court rule- upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant Bram to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination and that he searched him; that the defendant was then in custody and did everything the witness directed him to do; that all this took place before the defendant had been examined before the United States consul, and that the witness did not know that the local authorities had at that time taken any action, or that the defendant was held

for the consul general of the United States. The witness answered questions by the court as follows: You say there was no inducement to him in the way of promise or exception of advantage?" "A. Not any, your honor." "Q. Nor anything said in the way of suggestion to him that he might suffer if he did not—that it might be worse for him?" "A. No, sir, not any."—"Q. So far as you were concerned, it was entirely voluntary?" "A. Voluntary indeed." "Q. No influence on your part exerted to persuade him one way or the other? "A. None whatever, sir, none whatever." The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: That at the time the defendant was in the custody of the Chief of Police at Halifax; that the witness in an official capacity directed the police authorities to bring defendant as a prisoner to his office and there stripped him; that the defendant understood that he was a prisoner, and obeyed *a*very order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by *y*he defendant while so held in custody and his rights interferred with to extent described was a free voluntary statement, and no statement made by him bearing upon this issue was competent. The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions
93 were allowed. The witness answered as follows: "When Mr. Bram came into my office, I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown in this office and he made a st*e*tement that he saw you *to* do the murder." He said: "He could not have seen me; where was he?" I said: "He states he was at the wheel." "Well, he said, he could not see me from there." I said: Now look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But, I said, some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." He said: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." He was rather short in his replies." "Q. Anything further said by either of you?" "A. No; there was nothing further said by either of us?" The direct examination of this witness was limited to the interview between the witness and the defendan*d* Bram. *Held.*

(1.) That this statement made by the accused to a police officer, was evidently not a voluntary confession and was not admissible in evidence against him;

(2.) That the objection to its admission, having been twice presented and regularly allowed, it was not necessary that it should be renewed at the termination of the testimony of the witness."

Bram *v.* United States, 168 U. S. 532, 533.

In this case the opinion of the Court was delivered, as heretofore stated, by Mr. Justice White; but a dissenting opinion, written by Mr. Justice Brewer, and concurred in by Mr. Chief Justice Fuller

and Mr. Justice Brown, was read in which strong grounds are taken against the views expressed in this decision, and the confessions of Bram are considered under the evidence stated to have been voluntary, and admissible in evidence.

The same high court, in another noted case, had previously ruled in regard to this matter as follows:

"The true test of the admissibility in evidence of the confession of a person on trial for the commission of a crime is that it was made freely, voluntarily and without compulsion or inducement, and this rule applies to preliminary examinations before a magistrate of persons accused of crime.

When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they should reject it if, upon the whole evidence, they are satisfied that it was not the voluntary act of the defendant."

94 Wilson *v.* United States, 162, U. S. 613.

In another case the same high tribunal uses the language following:

"The admission of certain statements made by the defendants while they were under arrest and handcuffed, was also objected to. No exception was taken to the admission of this testimony, and the court properly held that the mere presence of officers is not an influence. Confessions are not rendered inadmissible by the fact that the parties are in custody, provided that such confessions are not ex-orted by inducements or threats. (Hopt *v.* Utah, 110, U. S. 574, 583; Sparf *v.* United States, 156, U. S. 51, 55). The so called confessions show merely that the defendants acted in a somewhat suspicious manner when first arrested, saying: "If we killed him, you prove it;" "that is for us to know and you to find out." And that they refuse- to tell their names. There was clearly no objection to this testimony.

Pierce *v.* United States, 160, U. S. 357.

In another case the Supreme Cour- said:

"We are of opinion that as the declaration- of Hansen to Sondergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by coun*c*il representing both defendants, should have excluded them as evidence against him, and admitted them against Hansen. The fact that the objection was made in the name of both defendants did not justify the court in overruling it as to both, when the evidence was obviously incompetent, and could not have been made competent against Sparf, and was obviously competent against Hansen.

It was not necessary that counsel should have made the objection on behalf of one defendant and then formally repeated it in the same words, for the other defendant. If Sparf had been tried alone a general objection in his behalf on the ground of incompetency would have been sufficiently definite. Surely, such an objection coming from Sparf when tried with another ought not to be deemed in-

effectual because of the circumstance that his counsel, who by order of the court represented also his codefendant, incautiously spoke in the name of both defendants. Each was entitled to make his own defence, and the jury could have found one of them guilty and acquitted the other. Mutual Life Ins. Co. *v.* Hillmon, 145, U. S. 285, 293. See also Commonwealth *v.* Robinson, 1 Gray, 555, 560.)

"Confessions of a person imprisoned and in irons under an accusation of having committed a capital offence are admissible in evidence against him; if they appear to have been voluntary, and not obtained by putting him in fear or by promises."

Sparf and Hansen *v.* United States, 156 U. S. 58.

In another well considered case Mr. Justice Harlan in delivering the opinion of the Supreme Court of the United States, uses the following pertinent language:

95 "While some of the adjudged cases indicate distrust of confessions which are not judicial it is certain, as observed by Baron Parke in Regina *v.* Bald, 2 Den. (English) Cr. Cas. 430, 445, that the rule against their admissibility has been some times carried too far, and in its application justice and common sense have /too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B. 1 Leach, 263, is deserving of the highest credit because it is presumed to flow from the strongest sense of guilt, and therefore, it is admitted as proof of the crime to which it refers."

Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs of the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession. 1 Greenleaf Ev. Sec. 215; 1 Archnold Cr. Pl. 125; Phillips' Ev. 533–34; Starkie Ev. 73.)

But the presumption upon which weight is given to such evidence namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confessions appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self control essential to make his confession voluntary within the meaning of the law. Tested by these conditions, there seems to have been no reason to exclude the confession of the accused; for the existence of any such inducements, threats or promises seems to have been negatived by the statement of the circumstances under which it was made."

Hopt *v.* Utah, 110 U. S. pp. 584 and 585.

In the cases quoted from the Supreme Court of the United States, the defendants making the confessions, Bram, Wilson, Hopt, Hansen

and Pierce, were all prisoners at the time the confessions were made; and in some cases in irons. This in itself rendered careful inquiry as to compulsion necessary and in this particular these cases naturally differ from the case at bar.

The California decisions with regard to confessions made in criminal cases, are in harmony with those of the Supreme Court of the United States and to the following effect:

"The confessions of the defendant to the effect that he was
96 guilty of the crime, and that he assisted in forcibly taking the money from Nevis, were admitted in evidence. Defendant claims that such confessions were not free and voluntary, and were made under the inducement of a promise that it would go easier with him if he would confess. Three witnesses for the prosecution testified to the effect that the confessions were voluntary on the part of defendant, and not made under the influence of threats, intimidations, promises or inducements of any kind. It was attempted by defendant's testimony to show that promises were made to him that it would be made easier for him if he would confess. We do not think the defendant's evidence clearly shows any such promises, but, if it did, the jury, under proper instructions from the court, where the sole judges of the credibility of the witnesses in regard to the matter. It would be a strange rule that would allow the confessions of a defendant to be given in evidence upon clear proof that they were made voluntarily and without any promise, threat, or inducement, and then allow them to be striken out upon the defendant testifying that they were made under the fear of a threat or the influence of a promise. If such were the law, it would always lie in the power of a defendant to clear awway from the case all confessions by his own evidence, and this regardless of the truth of such testimony."

People *v.* Oliveria, 127, Calf. p. 381.

"There is no substantial merit in the other points made. It was not error to admit oral evidence of statements and declarations made by defendant other than those contained in his written confession. The latter was not the best or any evidence of anything but its own contents. Nor was it any objection to the admission of the written confession that it appeared to have been made by defendant under a state of great excitement. This fact might affect its consideration by the jury, but not its admissibility."

People *v.* Cokanhour, 120, Cal. p. 254.

"One of the confessions introduced was a letter written by the defendant when in jail, to the prosecutin- witness. The defendant testified that the letter was written at the request and on the advice of her mother, who visited her at the jail with one Oxendine, and told her that she had consulted an attorney, who, advised the writing of the letter. In this connection, the defendant, offered to prove by her own testimony, and by the testimony of her mother and of Oxendine, that at that conference she told them she was entirely innocent. The Court excluded the evidence, Held, that the ruling

was error, as the conference and the writing of the letter should be considered as one transaction."

People *v.* Yeaton, 75, Cal. p. 416.

"The statement of the defendant to the witness, Sarah C. Kirby, did not constitute a "Confession," admissible only after proof that it was made voluntarily. A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. (People *v.* Strong, 30 Cal. 157;
97 1 Greenleaf Ev. 170.) An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tends to establish guilt. The statement of the defendant objected to was, at most, an admission that he had taken improper liberties with the prosecutrix, or had with her consent attempted carnal intercourse with her. However immoral his conduct, his admission was not a confession of his guilt of the crime for which he was indicted (Rape) nor of any offense included in that crime."

People *v.* Parton, 49 Cal. p. 638.

"The evidence conclusively shows that inducements were held out to defendants by the Sheriff having them in custody, two days before their prelim-nary examination to confess. They were told by the Sheriff that it was no use for them to deny taking the property; that there was evidence enough to convict them; that it would go lighter with them to confess. And the evidence of the Sheriff sufficiently shows that, after he had thus threatened and advised the prisoners, they did confess to him; but the purport of such confessions does not appear, further than they told him about the grain, and did not deny taking it. It is very clear that any statements or confessions they may have then made to the Sheriff were not voluntary, and could not properly have been given in evidence against them on the trial. And it is equally clear that if their confession or statement, made before the examining magistrate two days thereafter, was a repetition of the statement made to the Sheriff, or any material portion of such previous statement, the entire statement or confession made to and before the examining magistrate should have been excluded as evidence, by reason of the same having been originally made under such inducements held out to them as to exclude the first confession. The law presumes the subsequent confessions to have been made and influenced by the same hopes and fears as the first, and this presumption continues until it be affirmatively established by the prosecution that the influences under which original confession was made had ceased to operate before the subsequent confession was made. State *v.* Roberts, 1 Dev. 259; Peter *v.* State, 4 Sm. & Marsh. 3; State *v.* Gould, 5 Halsted, 163; Deathridge *v.* State, 1 Sneed, 75; 2 Russ. on Cr. 834; 1 Wharton Am. Cr. Law, Sec. 694."

People *v.* Johnson, 41 Cal. pp. 454, 455.

"Confessions which are entirely voluntary when made are admissible in evidence, even if, on a prior occasion, some promise of

favor not acted upon, and which had ceased to be operative, had been made to induce the accused to confess. The question as to the admissibility of confessions is one for the exercise of a sound judicial discretion, to be guided by the circumstances of each particular case."

People *v.* Jim Ti, 32 Cal. pp. 60, 61.

"A confession, in criminal law, is a voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same. (Bouv. Dic. Confess.) The word "Confession" is not the mere equivalent of the words "statements" or "declarations."

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People *v.* Strong, 30 Cal. pp. 157 & 158.

Naturally we are inclined to give great weight to the opinion of the Supreme Court of the United States, and those of the highest court in California from whose statutes our Criminal laws were adopted. But similar decisions can be found in almost all the states.

These quotations might be indefinitely extended but those already made are more than sufficient. A few of the most pertinent cases in regard to confessions may be enumerated as is done in the following list:

Bram *v.* The United States 168 U. S. 532.
Wilson *v.* " " " 162 " " 613.
Pierce *v.* " " " 160 " " 355.
Sharf *v.* " " " 156 " " 51.
Hopt *v.* Utah 110 " " 574.
People *v.* Oliveria, 127 Cal. p. 381.
People *v.* Cokanhour, 120, Cal. p. 254.
People *v.* Yeaton, 75 Cal. p. 416.
People *v.* Parton, 49 Cal. p. 638.
People *v.* Johnson, 41 Cal. pp. 454, 455.
People *v.* Jim Ti, 32 Cal. pp. 60, 61.
People *v.* Strong, 30 Cal. pp. 157, 158.
Cain *v.* State, 18 Tx. 390.
Searcy *v.* State, 28 Tx. App. 514; 19 Am. St. Rep. 851.
Lauderdale *v.* State, 31 Tx. Cr. App. 50; 37 Am. St. Rep. 788.
Grimsinger *v.* State, 44 Tx. Cr. App. 1.

The confession in the case at bar not falling within the inhibitions mentioned in the authorities herein quoted was properly admitted for the consideration of the Jury in connection with the other evidence.

It has been suggested that in cases of this kind it is proper for the trial Judge in his charge or instructions to the Jury to submit the confession to them accompanied by the evidence that is taken in regard to the circumstances under which it was made and to let them decide whether it was voluntary or made under the influence of fear, threats, or promises of immunity or assistance, or other improper motives. This is the practice of some states, and where there is any doubt about the confession being the

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voluntary act of the accused, made freely by him without any undue influence, it would be proper to take such a course. This practice was approved by Mr. Justice Shepard (now Chief Justice) in the case of Hardy *v.* The United States, decided by the Court of Appeals of the District of Columbia on 11th of December, 1893. 3 Dist. Col. App. 35. Mr. Chief Justice Fuller in the Wilson case, cited herein on another point, in delivering the opinion of the Supreme Court of the United States, on the 27th of April, 1896, in which he cites the Hardy case took the same ground and announced:

'Where there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decide that it is admissible, the question may be left to the Jury with the direction that they should reject the confession if upon the whole evidence they are satisfied that it was not the voluntary act of the defendant." 162 U. S. 624.

The trial court is always safe in taking this course, and should carefully observe it in doubtful cases. And, in the case at bar, the action of the court, in rehearing in the presence of the jury the evidence of the witnesses Dix, Harry, Dexter, and Kent, as to the circumstances under which the confession was given, and in commenting on it, and in other expressions used in the charge, practically amounts to such instruction. But even if the Judge had simply admitted the confession in evidence before the Jury without any qualifying instructions, under the view which we take of the confession it would not have been a material error.

This confession in the case at bar when tested by the law and the facts presented in the numerous authorities quoted and cited appears to have been made without compulsion or undue promise or inducement, and to be entirely voluntary. A conversation appears from the record to have taken place, at some time previous to the date of the letter, between Dix and Kent in the presence of the Rev. Mr. McCormick. Dix afterwards reduced the statements made by Kent in that conversation to the form of a letter as he says almost word for word. With this letter in his pocket Dix went alone to Kent's house on Thursday, two days before the arrest and after Kent had been discharged from his position in Treasury Department. There he met Kent and they had some five minutes conversation at the door before they entered the dwelling and then went into the house where Kent signed the letter, and at the suggestion of Dix called Smith to witness it, which he did. In the conversation between Dix and Kent, if the testimony of the former is to be believed, nothing transpired in the way of an inducement or a promise in order to secure Kent's signature to the document; if the latter spoke the truth in his testimony the contrary is the fact. Dix says in effect that in reply to a question of Kent, asking him if it was designed to use the document in a prosecution against him (Kent), he (Dix) said to Kent that the books and documents of the Club were sufficient to convict him, and that no promise whatever was made to Kent, that he presumes that Kent signed the letter hoping that he (Dix) would be a little easier on him, but that he did not promise to be so, but that on another occa-

sion he had promised Kent that if he would return the money he (Dix) would not prosecute him, (Kent).

Kent says substantially that Dix stated that he did not intend to use the document under any consideration, that he only wished it in case he (Kent) should acquire any property he (Dix) would have something to show; and he promised that if he would sign the document he (Dix) would not institute proceedings against him (Kent), or that proceedings would be stayed, and he signed
101 for that reason. Of course the court or the jury as the case may be must choose which of two contradictory statements made by the witnesses is worthy of credence. The choice has been made in favor of the Statement made by Dix. We think that this selection was entirely correct. No great weight can be given to the unsupported testimony of the defendant making the confession in such cases. Aside from the fact that the accused is greatly interested in excluding the confession from the record, if he could by such means succeed in doing so, very seldom if ever could the confession of a prisoner become evidence against him. Besides all the circumstances surrounding this case go to show that the confession was purely voluntary. The letter although prepared under the direction of Dix was virtually dictated by Kent. Dix went to the residence of Kent alone and they met there on a perfect equality. Kent was no longer Dix's subordinate in official position. He was free from arrest, in his own house, surrounded by friends, perfectly free to do as he pleased, and no compulsion or persuasion was used to influence him. Of his own accord he signed the document and called one of his own friends to witness it and deliver it to Dix. If there ever was a voluntary confession it is the one contained in this record. The trial Judge was right in admitting it in evidence and the Jury were justified in considering it, if they did so, in making up their verdict.

9th. The defendant in the 35th and 36th exceptions presented the question of reading to the Jury the testimony tak*ing* during their withdrawal in regard to the signing and delivery of the confession. The court refused to have the testimony read to the jury but permitted the witness to be fully examined again on that matter which was the better plan, and was entirely correct. The
102 defendant even if the ruling had been wrong, was not, in view of the subsequent action of the court in permitting an examination of the witnesses in the presence of the jury, prejudiced by the action of the court, and such an error would have been no ground for a reversal of the judgment of conviction. The rights of the defendant, in regard to the preliminary proof on the admission of the letter denominated a confession, were fully safeguarded by the court, and there is nothing in this proceeding of which anyone can complain.

10th. The defendant by this 37th exception contended that the confession not having been read to the jury at the time it was presented could not afterwards be read in evidence to the jury by the fiscal. The court, in consideration of the fact that the confession was written in English, and had already been translated into Spanish

by the official Interpreter for the information of the jury, and the translation accepted by all parties as correct, permitted the reading to be made in English as it was written.

Under section 233 of the Code of Criminal Procedure the trial of a case is required to proceed in a certain order "unless otherwise directed by the court." The next section reads as follows:

"SECTION 234.— When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in the preceding section may be departed from."

This section is identical with section 1094 of the Penal Code of California. The Supreme Court of that State, in interpreting that Statute, says that the court, in exercising the discretion confided to it by this act, need not state any reason for the ruling made, and on appeal it will be held that the discretion was wisely exercised,
103 unless there has been a manifest abuse of its discretion.
People *v.* Gordon, 103, Calf. 568.
People *v.* Strong, 48, Calf. 303.
People *v.* Ham, 44 Calf. 96.

This was a matter entirely within the discretion of the trial court; which, in the details of the trial, the order in which the evidence may be introduced and the like, has wide bounds and will rarely be reviewed on appeal; never except when it clearly appears that in the use of that discretion, an injury has been done to one of the parties to the action.

11th. Under exceptions Nos. 24, 30, 31, 32, the defendant objected to the testimony of the witnesses Petterson, Candina, Morris, and Tuzo on the ground that their names had not been presented to the defendant in accordance with law.

These exceptions are presumably based on section 142 of the Code of Criminal Procedure which reads as follows:

"SECTION 142.—The arraignment must be made by the prosecuting attorney, which consists in reading the information to the defendant and delivering to him a copy thereof, and of the indorsements thereon, including the list of witnesses, whereupon the court asks him whether he pleads guilty or not guilty to the information."

It was not the intention of this statute to prevent the prosecuting attorney from examining any witness whose name might not be endorsed on the information. A statute similar to ours exists in California, and was construed by the Supreme Court of that State in the following words:

"It was not error for the Court to permit a witness to be sworn for the prosecution, because his name was not marked on the indictment. It often happens that the necessity for introducing particular witnesses arises on the trial; and justice would be greatly impeded if the rule invoked were affirmed, while no corresponding advantages would accrue from it."

The People *v.* Bonney, 19 Calf. 447.

To the same effect are the decisions of the same eminent court in the folowing cases:

104 People *v.* Jocelyn, 29 Calf. 562.
People *v.* Lopez, 26 Calf. 112.
People *v.* Symonds, 22 Calf. 348.
People *v.* Freeland, 6 Calf. 96.

The introduction and examination of witnesses on a criminal trial are necessarily placed under the control of the trial court and in many instances the judge must use a sound judicial discretion in regulating the same. Unless his discretion has been so used as to prejudice the rights of the defendant or the People and this is made to appear from the record his rulings in such matters are not subject to revision. Law of 30th of May, 1904, Special Session, p. 10.

12th. The witness Peterson having been asked if he knew that Mr. Dix conferred the duties of Treasurer on any other person, the defendant's objection, made upon the ground that the witness was incompetent upon that point, was overruled and the 25th exception taken thereto. No further reason is given for the objection to this testimony nor is any explanation made of why the witness should be deemed incompetent. Nor does the ruling of the court throw any further light upon the matter. The witness should certainly have been permitted to state whether or not he had any knowledge concerning any fact unless the fact itself was altogether impertinent to the issue on trial. There is nothing worthy of consideration in this exception.

13th. The 26th exception relates to a certain book about which the witness Petterson was examined and which the defendant's counsel claimed the right to inspect.

Certainly the defendant's counsel had the right to inspect the book in question, or any other document offered by the prosecution, before it could be admitted in evidence. But the prosecuting attorney was properly permitted first to examine the witness upon

105 it and the defendant's counsel could not claim the right of inspection until this examination was concluded and the witness passed to the defence for cross-examination. At such a stage of the proceedings defendant's counsel could demand an inspection of the book and time to examine it. This as appears from the record was the course which was substantially pursued by the trial court, and in this matter no error occurred.

14th. The 27th, 28th and 29th exceptions were made by defendant's counsel to a question propounded by the Fiscal to the witness Harry, who was called by the prosecution. He was asked: "Did you testify before Mr. Rossy, the Fiscal of this Court?" A paper was presented to him purporting to be his testimony taken before the fiscal and counsel claimed the right to inspect it. The objection was on the ground that the Government could not thus impeach its own witness. The Court on the authority of sections 243 and 245 of the Court of Criminal Procedure overruled the objection. The sections cited plainly support the ruling of the court. If the object of the fiscal was to impeach the witness Harry, which is not shown

by the record, he clearly had a right to do so by showing that he had at some other time made statements inconsistent with the testimony then given. If the document presented to the witness was signed by him, then he had the right to inspect it, under certain restrictions, for the purpose of refreshing his memory as to the facts stated. In either case the exception made by the defence should not prevail. This exception does not clearly present the objection made by defendant's counsel and it is very difficult to surmise the point which counsel desired to make. If exceptions taken on the trial are so obscurely worded that this court cannot understand the
106 issue presented, the action of the trial court in regard to the matter must be sustained.

15th. The 33rd exception made by the defendant was to the overruling by the court of a motion made in his behalf to instruct the jury to render a verdict of acquittal for want of sufficient evidence to sustain a conviction, or to overcome the presumption of innocence. This involves a review of the whole evidence introduced by the prosecution up to the 13th of September 1904, the date of the said motion. This will be considered in connection with the motion to direct a verdict of acquittal made later at the conclusion of the trial and set out in the 38th exception. From all that appears in the record, this motion was properly overruled. All the testimony taken on the trial, was not contained in the record, there being no statement of facts and the bill of exceptions only presenting detached portions of the evidence, and the court must, therefore, act on the presumption that there was sufficient evidence introduced to justify the action of the trial court in overruling defendant's motion, to instruct an acquittal.

16th. At the conclusion of the evidence by both parties the defendant, as appears by this the 38th exception, moved the court to direct a verdict of acquittal in his favor, on the ground that there was no evidence on which to base a verdict of conviction and no proof of the offence of which the defendant was accused. This brings the whole evidence before this Court for review. But we are confronted with the condition of the record which does not include a statement of facts; and the bill of exceptions therein contained does not purport to set out all the evidence or a sufficient part of it to enable this court to properly consider either this proposi-
107 tion or the previous one which was presented under this 33rd exception. This Court cannot guess at the question. The whole proof must be presented to the appellate court in a matter of this kind involving as it does the sufficiency of the evidence produced on the trial to support the verdict of the jury and the judgment of the court. We have repeatedly decided that we cannot consider propositions involving the weight of evidence or the effect which it should have, unless the verbal testimony produced on the trial, or at least all of it which is pertinent to the point in issue, is brought before this court, on a bill of exceptions, or a statement of facts. This is in accordance with section 214 of the Code of Civil Procedure to which reference is made. This has not been done in

this case hence the ruling on these motions can not be reviewed nor held to be erroneous; but must stand as correctly made.

See cases decided by this court as follows:

People of P. R. *v.* Francisco Rivera, decided 9th December, 1905;

People of Porto Rico *v.* Eligier and Grolo, decided 20 November, 1905;

People of Porto Rico *v.* Brenes, decided 18th December, 1905;

Also the authorities cited in the Opinions in these cases.

17th. The charge of the court was objected to in the 39th exception of the defendant; and special reference is made to that portion of the charge defining the crime of *"abuso de confianza"* (embezzlement). The charge is found on pages 222 to 227 inclusive of the record. It correctly defines the offence of embezzlement which is translated by the Spanish term *"abuso de confianza,"* which literally means *abuse of confidence.* Ambiguities will necessarily
108 arise in translating legal terms from one language to another, but in this case the ambiguity is reduced to a minimum and the defendant has suffered no injury thereby. No specification is made of the grounds of defendant's objection to the charge and no further explanation given of the matter. Such an exception is too vague to merit attention or demand of an appellate court any extensive investigation. The charge taken as a whole is an able exposition of the law in regard to the case on trial. It was eminently clear and fair to the accused, as well as just to the Government. No well grounded exception, as far as our observation has extended, can be taken to it by the accused.

18th. The defendant, in the 40th exception, objects to the verdict of the jury which reads as follows:

"No. 822.—The People of Porto Rico *v.* J. E. Kent.—We the members of the jury, find J. E. Kent, guilty of the crime of embezzlement with which he is charged.—San Juan, P. R., 14 September, 1904.—(Signed)—Juan Apellaniz, foreman."

Of this the defendant complains, for the following reasons stated in the words of his counsel to wit:

"Which said verdict is bad in this, and cannot and ought not to sustain the commitment of the said defendant on the ground that it is contrary to section 284 of the Code of Criminal Procedure in that the said crime being a crime which is distinguished into degrees as appears in article 455 of the Penal Code while the said verdict does not so distinguish the said offence and by its terms could not and should not sustain a sentence for more than the lesser degree of said crime."

Section 284 of the Code of Criminal Procedure reads as follows:

"Whenever a crime is distinguished into degrees the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

We have heretofore held that this section must be complied with, in all verdicts rendered in crimes which are distinguished into de-

grees. See the case of Francisco Rivera decided on the 25th of June, 1904; Jur. Crim. p. 52 *et seq.*

109 Let us see if embezzlement is such a crime. It is claimed that embezzlement is a species of larceny differing from it only in the circumstance that in the former crime the offender already has lawful possession of the property which he appropriated to his own use while in the latter the property is illegally taken from the possession of the owner or his agent. This principle is correct as far as it goes. But is it divided into degrees? What does the law say?

Section 455 of the Penal Code reads thus:

"Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted."

The sections defining larceny are section 426, *et seq.* which read as follows:

"426.—Larceny is the felonious stealing, taking, carrying, leading or driving away the personal property of another."

"427.—Larceny is divided into two degrees, the first of which is termed grand larceny; the second, petit larceny."

"428.—Grand larceny is larceny committed in either of the following cases:

1.—When the property taken is of the value of fifty dollars and upwards.

2.—When the property is taken from the person of another.

3. When the property is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, or jenny.

"429.—Larceny in other cases is petit larceny and is punishable accordingly.

"430.—Grand larceny is punishable by imprisonment in the penitentiary for not less than one nor more than ten years.

"431.—Petit larceny is punishable by fine not exceeding five hundred dollars, or by imprisonment in jail not exceeding one year or both."

By section 455 of the Penal Code it is enacted that every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled. Nothing is said in the code about the division of this crime into degrees; and if it is to be considered as so distinguished, such a ruling must be based on the fact that the punishment is similar to that

110 provided for larceny.

The Fiscal of this Court argues on this point as follows:

"The crime of embezzlement, is really not a crime divided into degrees, but the punishment in case of conviction should be governed by the provisions of the Code for the appropriation of property and as the information sets out the value of the property appropriated, and therefore the crime charged is sufficiently well known. When the jury says: "We consider J. E. Kent, guilty of embezzlement, the crime of which he is charged, that crime could be no other than the appropriation to his own benefit of the sum of one thousand eight hundred and ninety-six dollars and seventy-seven cents, which is exactly the crime charged in the information."

Where the information is for grand larceny and the verdict returned finds the defendant "guilty as charged," this has been held to constitute a conviction of grand larceny. The verdict in such a case is not held amenable to the objection that it does not specify the degree as required in section 284 of the Code of Criminal Procedure. This latter section is identical with 1157 of the Penal Code of California and section 2145 of the Penal Code of Montana. Then, even conceding that embezzlement is a form of theft or larceny, the verdict under the California decisions need not designate the sum embezzled with more particularity than to find the defendant "guilty as charged" then the sum embezzled is fixed in the information itself. This statement is in accordance with the California decisions which are as follows:

"The information is for grand larceny, and a verdict of "guilty as charged" is a conviction of grand larceny. (People *v.* Whitely, 64 Cal. 211; People *v.* Price, 67 Cal. 350.")

People *v.* Perez, 87 Calf. 123.

In another case Chief Justice Morrison says:

"The defendant was charged by information, prosecuted, and convicted of the crime of grand larceny, the charge being that she feloniously took and carried away four twenty dollar gold pieces, the same being the property of the prosecuting witness. On the trial, the court charged the jury that the form of the verdict should
111 be, if they found the defendant guilty, as follows: "We the jury, find the defendant guilty as charged." The jury did find the defendant "guilty as charged" and this presents the only point in the case on appeal."

"The question is not a new one in this Court. In the case of People *v.* Whitely, 64 Cal. 211, this Court sitting in Bank, held such a verdict good, and affirmed the judgment. In the more recent case of People *v.* Price, 67 Cal. 350, the case of People *v.* Whitely, *supra*, was cited with approbation by the entire court. These cases leave the question no longer open in this court, and following the same, we must affirm the proceedings in the court below."

People *v.* Manners, 70 Calf. 428.

In another case the Supreme Court of California uses the following language:

"The other point is that the verdict is a nullity inasmuch as it does not conform to section 1157 of the Penal Code, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant must find the degree of the crime of which he is guilty."

"The only question in the case is whether the crime with which the defendant was charged and of which he was convicted is distinguished into degrees. If it is, the verdict, of the jury is clearly imperfect and bad under the foregoing section of the Penal Code."

"By section 486 of the Penal Code "larceny is divided into two degrees, the first of which is termed "grand larceny;" the second "petit larceny;" and by section 487 grand larceny is committed in either of the following cases:

"1. When the property taken is of the value exceeding fifty dollars.

2. When the property is taken from the person of another.

3. When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack or jenny.

"Section 488.—Larceney in other cases is petit larceny."

In the case we are now considering the defendant was charged with the crime of grand larceny, inasmuch as he was accused of stealing money from the person of another.

It will be observed that the defendant was charged in the information with the crime of grand larceny, and it was further charged that the stolen goods were taken from the person of another. Now, there is under the law but one degree of grand larceny, whether the property stolen is of the value of fifty dollars or fifty thousand dollars, and every larceny committed by taking from the person of another is in its degree grand larceny. So that in either aspect of the case the charge against the defendant was the crime of grand larceny, which as already remarked, is without degrees, and the verdict of the jury finding the defendant guilty was guilty as charged; that is to say, guilty of grand larceny.

112 "In the case of the People *v.* Whitely, 64 Cal. 211, in which the defendant was charged with the crime of grand larceny, the verdict was "guilty as charged," and it was held sufficient. In our opinion the same rule is justly applicable to the case now before us. There is nothing doubtful or uncertain in the verdict."

People *v.* Price, 67 Calf. 350.

The verdict would probably be considered sufficient under section 283 of the Code of Criminal Procedure, which says: "A general verdict upon a plea of not guilty is either "guilty" or "not guilty," which imports a conviction or an acquittal of the *offence charged in the information.*" As embezzlement is not itself divided into degrees or even into *grand* embezzlement and *petty* embezzlement, no*t* reference need be made to section 284 of same Code.

We feel constrained to hold this verdict sufficient, in view of the construction put upon the sections of the Code, to which reference has been made, by the Supreme Court of California, although the reasoning is not altogether clear or satisfactory to our minds. It has become an established canon of construction in the Supreme Court of the United States that where a statute is adopted from the Code of another State, it is presumed to have been taken with its meaning as judicially determined in the State from which it was adopted. See the following authorities:

Henrietta Mining & Milling Co. *v.* Gardner, 173 U. S. 130.
Brown *v.* Walker, 161 U. S. 600.
McDonald *v.* Hovey, 110 U. S. 628.
Cathcart *v.* Robinson, 30 U. S. 279.
Pennock *v.* Dialogue, 27 U. S. 16.
Sedgwick on Cons. Stat. & Cons. Law, 363.
Smith's Com. on Stat. & Cons. Law, 634.

19th. The sentence is also denounced as illegal by the 41st exception taken by the defendant, but the ground of the objection is not stated. It may be on account of the term of punishment which was imposed upon the defendant. The punishment could have been fixed at any term in the penitentiary ranging from one to ten years. It was fixed at three years, which was within the limits. As the discretion is confided to the trial court to fix the term of im-
113 prisonment, unless an abuse of such discretion is shown in the record this court will not modify the sentence in this respect. See case of People of Porto Rico *v.* Brenes, decided on the 18th of December, 1905, at a former term of the Court; and cases there cited. No such abuse is shown in this case and the term is not long in proportion to the offence.

20th. Other matters than those set out in the bill of exceptions, and which do not properly belong to the case or the record have been injected into this trial, but they deserve no attention and will receive none.

From the careful and repeated examination made of the entire record, and particularly of the questions raised in favor of the defendant, we are fully convinced that the trial of this case in the District Court was fair and impartial, and that no material error has been committed there which could in any way prejudice the rights of the accused; and we therefore maintain the opinion that the Judgement of the District Court should be affirmed.

J. H. McLEARY.

114 In the Supreme Court of Porto Rico.

No. 46.

THE PEOPLE OF PORTO RICO, Respondent,

vs.

JAMES E. KENT, Ap-el-ant*e*.

Appeal from a Judgment of Conviction Rendered by the District Court of San Juan.

Judgment.

SAN JUAN, PORTO RICO, *5th March*, 1906.

This Court has carefully examined the record in this case, and is of the opinion that the trial court has proceeded according to the law and the facts in rendering the judgment appealed from; for which reason, and for the reasons set forth in the opinion herein, the judgment rendered by the District Court of San Juan on the 17th of September 1904 is hereby affirmed, with costs of the appeal against the appellant; and it is ordered that a certified copy of this judgment and of the said opinion be forwarded to the trial court for compliance therewith. Thus by this our sentence we pronounce, command and sign.

JOSÉ S. QUIÑONES.
JOSÉ C. HERNANDEZ.
JOSÉ MA. FIGUERAS.
J. H. MacLEARY.

115 In the Supreme Court of Porto Rico.

46.

THE PEOPLE OF PORTO RICO, Respondent,
vs.
JAMES E. KENT, Appellant.

Appeal from a Judgment Rendered by the District Court of San Juan.

Concurrent Opinion of Mr. Justice Wolf.

SAN JUAN, PORTO RICO, 31*st of March*, 1906.

I concur with the majority of the court in maintaining that the judgment of the District Court of San Juan should be affirmed and I am in accord with most of the reasoning of the majority opinion.

One of the principal questions involved was whether the record showed the confession to have been made voluntarily. The facts surrounding this confession have been fully set forth by the court, and I think there was enough evidence tending to show that such confession was a voluntary one. The question of its voluntary character was inquired into by the court below after a preliminary examination of the witnesses offered by the fiscal and of the defendant, and that court decided to admit it in evidence. Subsequently, at the request of counsel for the defendant the court per-
116 mitted the witness Dexter and the defendant to testify with respect to the confession. Thus it was brought within the power of the jury to reject the confession as not being the voluntary act of the accused. Counsel for the defence asked for no instructions on this point, and no specific ones were given. Even if counsel had asked for an instruction that the jury should reject the confession, if upon the whole evidence they were satisfied that it was not the voluntary act of the accused, and the court had refused the instruction, I do not believe that such refusal would have been error, because, I conceive, that the record and the instructions show that the court had determined that question for itself.

However, no specific instruction was asked, and no exception taken to the charge of the court. The law of May 30th 1904 says:

"Whenever it appears from the record in any criminal case upon appeal in the Supreme Court, that any requirement of the law has been disregarded by the trial court, the judgment shall not be reversed, unless the error appearing from the record was calculated to injure the rights of either of the parties, and was duly excepted to in the trial court; provided, however, that the appellate court may take cognizance of fundamental errors, appearing in the record, although not excepted to, and render such judgment thereon as the facts and the law may require."

In view of the circumstances of this case, and especially considering the fact that the evidence of Dexter and of the accused was

submitted to the jury at the request of counsel for the accused, in no event could the absence of special instructions as to the confession be considered a fundamental error. The essential question of the admissibility of the confession was passed upon by the judge who tried the case, and I do not find that his action constituted error.

With respect to the other errors alleged I agree with the conclusion of the majority opinion and therefore concur in the judgment.

(Signed) ADOLPH G. WOLF.

117 *Delivery of Opinion and Judgment to Secretary of Dist. Court.*

On the fifth of March the foregoing opinion and sentence were delivered to the Secretary of the District Court of San Juan, who signs in acknowledgment of their receipt.

(Signed) A. F. CASTRO.
(Signed) FIGUERAS.

Notice of Appeal.

In the Supreme Court of Porto Rico.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

Embezzlement.

James E. Kent through his undersigned attorney, appeals from the judgment rendered by the Supreme Court in the above entitled cause, to the Supreme Court of the United States, for the reason that fundamental rights claimed under the authority and the plain and absolute provisions of the Constitution of the United States, and of the Law of Congress of the 12th of April 1900, entitled: "An Act Temporarily to provide Revenues and a Civil Government for Porto Rico, and For other Purposes" have been denied. At the proper time he requests the Hon. Court to be pleased to grant him sufficient time within which to draw up his writing of appeal, and to make a translation of the necessary documents contained in the record.

San Juan, Porto Rico, March 5th, 1906.

(Signed) LCDO. N. PEREZ MORIS.

Notified and received a copy this 5th day of March 1906.

(Signed) JESUS M. ROSSY,
Fiscal of the Supreme Court.

Order Allowing Appeal & Fixing Amount of Bond.

Supreme Court of Porto Rico.

No. 46.

THE PEOPLE OF PORTO RICO, Respondent,
vs.
JAMES E. KENT, Appellant.

Embezzlement.

SAN JUAN, PORTO RICO, *7th of March*, 1906.

The accused James E. Kent having presented a writing taking an appeal to the Supreme Court of the United States from the judgment of this Court rendered on the 5th of March of the present year, in the above entitled cause, and requesting that the amount of the bond be fixed which will be required for his provisional
118 liberty during the pendancy of the said appeal; it is ordered that said appeal be and the same is hereby allowed, granting the appellant the term of sixty days within which to present in the office of the Secretary of this Court a certified translation of the record in the said cause, to be forwarded to the Supreme Court of the United States; and it is further ordered that during the time the said appeal shall be pending the accused will be placed at provisional liberty after having given a bond in the sum of two thousand dollars, in cash, deposited with the Secretary of this Court, or with two good and sufficient sureties to the satisfaction of the Hon. Chief Justice of this Court.—It is so decided and the gentlemen of the Supreme Court sign:

JOSÉ S. QUIÑONES.
JOSÉ C. HERNANDEZ.
JOSÉ MA. FIGUERAS.
J. H. MACLEARY.
ADOLPH G. WOLF.

Bond.

In the Supreme Court of Porto Rico.

No. 46.

THE PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

Appeal from a Judgment Rendered by the Supreme Court of Porto Rico to the Supreme Court of the United States.

Obligation to Appear Before the Court.

I, James E. Kent, by these presents firmly and formally bind myself to pay to the People of Porto Rico the sum of two thousand ($2,000) dollars, which payment real- and truly to be made, if I should fail to comply with the following obligation:

Whereas the District Court of the Judicial District of San Juan, in a cause prosecuted by the People of Porto Rico, against James E. Kent, for embezzlement, rendered judgment on the 17th of September 1904, condemning him to three years' imprisonment in the Penitentiary at hard labor, and the costs, which sentence was appealed
119 from by said James E. Kent to the Supreme Court of Porto Rico, and affirmed in all of its parts by this last named tribunal, on the 5th day of March 1906, and

Whereas the said James E. Kent has taken an appeal from the said sentence of the Supreme Court of Porto Rico rendered on the 5th of March 1906, to the Supreme Court of the United States, and which appeal has been allowed by the said Supreme Court of Porto Rico in an order entered under date of the 7th of March 1906, the said court fixing therein the sum of two thousand ($2,000) dollars (as the amount of the bond) for the provisional liberty of the said James E. Kent, during the time that the said appeal may be pending before the Supreme Court of the United States;

Therefore, I James E. Kent, hereby bind and obligate myself to appear before the Supreme Court of Porto Rico and submit to and comply with the judgment which may be rendered in the Supreme Court of the United States, and I furthermore bind myself to abide by all and any of the orders which may be entered by the Supreme Court of Porto Rico in conformity with any that may be entered in the said appeal, or which may be entered by the Supreme Court of the United States, or to any other orders which the Supreme Court of Porto Rico may enter therein; I furthermore bind and make myself responsible to the People of Porto Rico for the costs in the said appeal to the Supreme Court of the United States. And to guarantee the faithful conpliance with the obligations assumed hereby, I James E. Kent, deposit with the Secretary of the Supreme Court, the sum of two thousand ($2,000) dollars, which shall be

returned to me if I comply faithfully with each and every one of the obligations assumed by me herein; otherwise the said sum to be confiscated by the People of Porto Rico and definitely enter
120 into the coffers of the Treasury.—Signed this obligation this 8th day of March 1906, in San Juan, Porto Rico.

(Signed) JAMES E. KENT.

Translator's Certificate.

I, the undersigned official English-Spanish Stenographer of the Supreme Court of Porto Rico, hereby certify that the foregoing is a true and faithful translation of the originals contained in the record of the above entitled case.

C. R. NEWTON,
English-Spanish Stenographer
Supreme Court of Porto Rico.

121 In the Supreme Court of Porto Rico.

PEOPLE OF PORTO RICO
vs.
JAMES E. KENT.

Petition for Writ of Error.

Comes now the above named defendant, by his attorneys Nemesio Perez Moris, and N. B. K. Pettingill, and complains that in the record and proceedings had in said cause, and also in the rendition of judgment in said cause in said Supreme Court of Porto Rico against said defendant on the 5th day of March A. D. 1906, manifest error hath happened to the great damage of said defendant.

Wherefore said defendant prays for the allowance of a writ of error to the Supreme Court of the United States, as by statute in such cases made and provided, and for such other orders and process as may cause the same to be corrected by the said Supreme Court of the United States.

Dated this 24th day of April, 1906.

N. PEREZ MORIS.
N. B. K. PETTINGILL.

122 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Porto Rico before you or some of you, being the highest court of law or equity of the said Territory of Porto Rico in which a decision could be had in the said suit between The People of Porto Rico, plaintiff,

and James E. Kent, manifest error hath happened to the great damage of the said James E. Kent, as by his complaint appears.

We being willing that error, if any, hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

123 Witness the Honorable Melville W. Fuller, Chief Justice of the United States the twenty third day of April in the year of our Lord one thousand nine hundred and six.

H. H. SCOVILLE,
Clerk of the United States District Court for Porto Rico.

Allowed by

[Seal United States District Court for the District of Porto Rico.]

JOSÉ S. QUIÑONES,
Chief Justice of the Supreme Court of Porto Rico.

124 THE UNITED STATES OF AMERICA:

The Supreme Court of Porto Rico, District of Porto Rico.

In pursuance of the command of the writ of error within, I, Antonio F. Castro, Secretary of the Supreme Court of Porto Rico, herewith transmit a true copy of the record, bill of exceptions, and all proceedings in this case of the People of Porto Rico *vs.* James E. Kent, lately pending in the Supreme Court of Porto Rico, under my hand and seal of said Court, according to præcipe filed by counsel for plaintiff in error.

Witness my official signature, and the seal of said Supreme Court, at the city of San Juan, Porto Rico, this twenty-third day of April, in the year of our Lord, one thousand nine hundred and six.

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary of the Supreme Court of Porto Rico.

125 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the People of Porto Rico, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Porto Rico wherein James E. Kent is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable José Severo Quiñones, Chief Justice of the Supreme Court of Porto Rico, this twenty-fourth day of April in the year of our Lord one thousand nine hundred and six.

JOSÉ S. QUIÑONES,
Chief Justice of the Supreme Court of Porto Rico.

I hereby, this 24th day of April, accept due personal service of this citation on behalf of the People of Porto Rico, respondent.

FRANK FENILLE,
Attorney-General of Porto Rico.

126 UNITED STATES OF AMERICA:

Supreme Court of Porto Rico.

I, C. R. Newton, English and Spanish stenographer of the Supreme Court of Porto Rico, do hereby certify that in the translation of the record in the case of the People of Porto Rico *vs.* James E. Kent, lately pending in said Supreme Court, I have discovered upon a reexamination thereof, that there exists an error in the translation of the 27th exception contained in the bill of exceptions, on page 46 of said translated record, and in the 12th line on said page, in that said 12th line on page 46 of said record as translated reads: "occasions, made statements *which agreed* with his present testimony;" whereas, it should read: "occasions, made statements which *did not agree* with his present testimony;"

Also that there exists an error in the record so translated, in that part thereof containing the translation of the testimony of the witness Frank H. Dexter, in his answer to the fourth question propounded to him by defendant's counsel, in that on page 49 of said record, in the 9th line of said page, under the said answer the witness appears to have sworn: "that he had *not* given that promise not to make it public, and;" whereas his testimony was, and the original Spanish record so shows: "that he *had* given that promise not to make it public, and."

Witness my signature in the city of San Juan, Porto Rico, this twenty-sixth day of April, nineteen hundred and six.

[Seal Supreme Court of Porto Rico, United States of America.]

C. R. NEWTON,
English and Spanish Stenographer
Supreme Court of Porto Rico.

Attested: A. F. CASTRO,
Secretary of the Supreme Court of Porto Rico.

127 UNITED STATES OF AMERICA:

Supreme Court of Porto Rico..

I, Antonio F. Castro, Secretary of the Supreme Court of Porto Rico,

Do hereby certify, upon the statement contained in the foregoing certificate of Mr. C. R. Newton, English & Spanish Stenographer of said Court, that in the transcript of the Record, Bill of Exceptions and other Proceedings, in the case of the People of Porto Rico *v.* James E. Kent, lately pending in said Supreme Court, and transmitted to the Supreme Court of the United States pursuant to a Writ of Error filed in said case, there exists an error in the 27th exception contained in the Bill of Exceptions, on page 46 of said transmitted record, and in the 12th line on said page, in that said 12th line on page 46 of said Record as transmitted reads: "occasions, made statements *which agreed* with his present testimony;" whereas, it should read: "occasions, made statements which *did not agree* with his present testimony;" so that the whole of said exception 27th, as corrected, should read as follows:

"27. Whereupon, the witness L. D. Harry was introduced by the Fiscal and among other questions was asked the following: 'Did you testify before the Fiscal of this Court, Mr. Rossy?" To which question the defendant through his counsel, objected on the ground that this question was for the purpose of impeaching the witness, which could not be done, because said witness being a witness for the government, could not be impeached by the prosecution. After the objection was argued it was overruled by the court, in accordance with the law, and especially in accordance with the provisions of sections 243 and 245 of the Code of Criminal Procedure, in view of

the fact that the Fiscal complying with all of the necessary
128 requirements, was endeavoring to show that the witness had on former occasions, made statements which did not agree with his present testimony; and the defendant duly excepted."

Also that there exists an error in the record so transmitted, in that part thereof containing the testimony of the witness Frank H. Dexter, in his answer to the fourth question propounded to him by defendant's counsel, in that on page 49 of said record, in the 9th line on said page, under the said answer the witness appears to have sworn: "that he had *not* given that promise not to make it public, and;" whereas his testimony was, and the original Spanish record

so shows: "that he *had* given that promise not to make it public, and," so that the whole of said answer, as corrected, should read as follows:

"W. I think it was several days after Mr. Kent had been arrested and had been put under bond and was at liberty. I accompanied him to visit Mr. Dix in the office of the treasurer. In that conversation reference was made by Mr. Kent to a certain document which Mr. Dix had in reference to this question prior to that date, and which was referred to as a confession made by Mr. Kent. Mr. Kent desired that Mr. Dix should not make use of that document, and he reminded me specially to make the conversation drift to that point. He (Mr. Kent), had related to me the circumstances, and as his attorney I felt that it was absolutely improper to make use of that document against him, because, under the circumstances and facts it was not voluntary and had been given under the promise that no trial should be had against Kent in this case. On stating substantially this to Mr. Dix, he replied that he had given that promise not to make it public, and prosecute the defendant by means of that document; Mr. Dix insisted that some arrangement be made
129 on the part of the accused, Kent, to return to Dix the money defalcated; that is as near as I can remember."

In witness whereof, and in order that said corrections may be made in the transcript of the record of said case, I hereunto set my hand and the Seal of said Supreme Court of Porto Rico, in the city of San Juan, Porto Rico, this 26th day of April in the Year of Our Lord one thousand nine hundred and six.

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary of the Supreme Court of Porto Rico.

130 In the Supreme Court of the United States, October Term, 1906.

JAMES E. KENT
vs.
PEOPLE OF PORTO RICO.

In Error to the Supreme Court of Porto Rico.

Assignment of Errors.

Comes now James E. Kent, plaintiff in error, by his counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment of the Supreme Court of Porto Rico in the above entitled cause, and assigns error thereto, as follows:

1. The said Supreme Court erred in sustaining the ruling of the trial court denying the motion of defendant, now plaintiff in error, to quash the criminal information filed against him.

2. The said Supreme Court erred in sustaining the ruling of the

trial court overruling defendant's plea in abatement to said information.

3. The said Supreme Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting one B. R. Dix, a witness for the People, to answer against the objection of defendant the question "As treasurer (of the Union Club) what are your duties?" and allowing the answer thereto to go to the jury as evidence.

4. The said Supreme Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting said witness, B. R. Dix, to answer against the objection of the defendant the question "Had you any agreement or did you confer any duty upon the accused with reference to that Club?" and allowing the answer thereto to go to the jury as evidence.

5. The said Court erred in not sustaining the exception
131 taken by defendant in the trial court to the ruling of that court in permitting said witness, B. R. Dix, to answer against the objection of defendant the question "Explain what passed between you and Kent" and allowing the answer thereto to go to the jury as evidence.

6. The said Court erred in sustaining the ruling of the trial court allowing the answer of said witness, B. R. Dix, to the question quoted in the last assignment to go to the jury as competent evidence in said cause.

7. The said Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting said witness, B. R. Dix, to answer against the objection of defendant the question "To what amount did the fraud ascend?" and allowing the answer thereto to go to the jury as evidence.

8. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in not excluding from the consideration of the jury the answer of said witness to the question quoted in the last previous assignment for the reasons then stated in defendant's objection thereto.

9. The said Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting said witness, B. R. Dix, to answer against the objection of defendant the question "What was his (Kent's) object in sending you this document? What did it say?" and allowing the answer thereto to go to the jury as evidence.

10. The said Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting said witness, B. R. Dix, to answer against the objection of defendant the question as to a certain book described as a "cash Book" "Are there any entries in that book and any signatures alongside of those entries?" and to continue testifying as to the contents of said book against the further objection of defendant, which testimony was allowed to go to the jury as evidence.

132 11. The said Court erred in not sustaining the exception taken by defendant in the trial court to the refusal of that court to strike out the testimony of said witness, B. R. Dix, as to the

contents of the "cash book" aforesaid as contained in the following questions and answers, to wit:

Q. On the 21st of March, adding the amounts delivered from the 13th to the 21st, what is the total of entries in this book?

A. From the 13th to the 21st inclusive, one hundred and fifty dollars and sixty-five cents.

Q. What expenses did the Union Club have from the 13th to the 21st?

A. Twenty-three dollars and seventy-five cents.

Q. So that the balance is a total of——

A. Of one hundred and twenty-nine dollars and thirty-one cents, after deducting expenses.

12. The said Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in admitting in evidence against the objection of defendant a certain letter, dated May 12, 1904, addressed to said witness B. R. Dix and signed by the defendant and designated as a confession, and allowing the same to go to the jury.

13. The said Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting one H. Peterson, a witness for the People, to answer against the objection of defendant the question "Do you know that Mr. Dix conferred the duties of treasurer (of the Club) upon any other person?" and allowing the answer thereto to go to the jury as evidence.

14. The said Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court denying defendant's motion, made at the conclusion of the case of the People, that the jury be instructed to return a verdict of not guilty.

15. The said Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court denying defendant's motion, made at the close of all the evidence, that the jury be instructed to return a verdict of not guilty.

133 16. The said Court erred in not sustaining the exception taken by defendant to that part of the charge of the Judge of the trial court to the jury, which explained the definition of the crime of embezzlement or "*abuso de confianza*" in the following words:

"Co-nsul for the defence has raised the question that the Spanish version does not correspond exactly with the English version. In the English text of Section 445 the word *embezzlement* is used, which is translated in the Spanish code as *abuso de confianza* (abuse of confidence). On page 215 in the second column of the Diccionario Ingles-Español y Español-Ingles by J. M. Lopez and E. R. Bensley the word *embezzlement* is translated as "Hurto, robo, el acto de ocultar á Hurtadillas alguna cosa puesta al cuidado de uno con intencion de apropriarsela" (theft, robbery, the act of taking by stealth anything placed in the keeping of a person, with the intention of appropriating the same), and the word *embezzler* is translated as "malversador, autor de un abuso de confianza" (one who misapplies property, author of an abuse of confidence) and other peculiar definitions. And in a dictionary all in English which we shall translate with the assistance of the interpreter of this court; that is to say the

Standard Dictionary of the English Language, published by Funk & Wagnalls Company, New York and London, 1900, we find on page 590, in the second column, in defining the word *embezzlement*, the following: "To appropriate or apply fraudulently to one's own benefit moneys or merchandise which have been officially or privately placed in his custody."

We think, then, that there is no question whatever on the part of the court; we submit to you the law just as it appears in the Spanish edition of our Code, which is certified to be a true and exact copy by the Secretary of Porto Rico, together with the foregoing explanation."

17. The said Court erred in not sustaining the exception taken by defendant in the trial court to the form of the verdict rendered against defendant by the jury and in not holding the same null and void.

18. The said Court erred in not sustaining the exception taken by defendant in the trial court to the validity of the sentence imposed upon him by virtue of the verdict rendered against him and in not declaring said sentence null and void.

19. The said Court erred in not reversing the judgment of the trial court and remanding this cause for a new trial in the court below because of the failure of the Judge thereof in his charge to the jury to comply with the provisions of Section 266 of the Code of Criminal Procedure of Porto Rico, in this, to wit: that he did not explain to said jury the meaning of Section 448 of the Criminal Code
134 which defines the classes of persons who may be guilty of embezzlement so that said jury might properly and legally determine whether defendant was included within any of such classes.

20. The said Court erred in not reversing the judgment of the trial court because of the further failure of the Judge thereof in his charge to the jury to comply with the provisions of said Section 266 of said Code of Criminal Procedure, in this, to wit: that he did not explain to said jury that, in case they should find that said defendant was a co-owner of the funds alleged to have been embezzled, he could not be found guilty of the crime charged.

21. The said Court erred in not reversing the judgment of the trial court because of the further failure of the Judge thereof in his charge to the jury to comply with the provisions of said Section 266 of said Code of Criminal Procedure, in this, to wit: that he did not explain to said jury that, the funds in question being alleged to belong to the Union Club, the defendant could not be convicted under the information unless they should find from the evidence that said funds were confided to defendant by said Union Club or under authority conferred by it.

22. The said Court erred in not reversing the judgment of the trial court because of the further failure of the Judge thereof in his charge to the jury to comply with the provisions of said Section 266 of said Code of Criminal Procedure, in this, to wit: that he did not explain to said jury the circumstances under which an extrajudicial confession would be null nor the conditions which must be present in order

that such confession might be legally considered as evidence, so that the jury might form an intelligent and legal conclusion as to whether they should consider the so-called confession submitted to them.

23. The said Court erred in holding by its decision as to the admissibility of the so-called confession of defendant that the Fifth Amendment to the Constitution of the United States "is the foundation of all laws and the basis of all judicial decisions guard-
135 ing the rights of the accused in the admission of confessions to be used against him in a trial for crime. * * * Com*pul*sion is the key of the prohibition. If there is no compulsion the confession does not fall within this constitutional inhibition."

24. The said Court erred in not reversing the judgment of the trial court because of the further failure of the Judge thereof in his charge to the jury to comply with the provisions of said Section 266 of said Code of Criminal Procedure, in this, to wit: that upon admitting before them the so-called confession of the defendant he left it to them to consider from all the evidence upon that point whether the same had been freely and voluntarily made without threat, inducement or hope of reward and, in case they found it had not been so made, they should exclude it from their minds in forming their verdict; and in holding by its opinion and decision that the action taken by the trial Judge "practically amounted to such instructions."

25. The said Court erred in holding as matter of law that the evidence touching the circumstances surrounding the making of the so-called confession of defendant, as recited in its own decision, did not bring said confession within the spirit of the inhibitions fixed by the precedents cited therein.

26. The said Court erred in deciding the question of the proper admission of the so-called confession in evidence solely upon consideration of the testimony of the prosecuting witness Dix on the one side and of defendant Kent on the other, and excluding from its consideration the testimony of the witness Dexter which was very material upon that issue.

27. The said Court erred in affirming the judgment of the trial court and in not reversing said judgment and remanding same with instructions to grant defendant a new trial.

Wherefore the said James E. Kent, plaintiff in error, prays the honorable Court to examine and correct the errors assigned
136 and for a reversal of the judgment of the Supreme Court of Porto Rico, entered in the above entitled cause.

And as in duty bound he will ever pray.

JAMES E. KENT,
Plaintiff in Error,
By N. B. K. PETTINGILL,
NEMESIO PEREZ MORIS,
His Attorneys.

136½ [Endorsed:] James E. Kent Plaintiffs in Error *vs.* People of Porto Rico Defendant in Error. Assignment of Errors.

137 [Endorsed:] File No. 20,250. Supreme Court U. S. October Term, 1906. Term No. 291. James E. Kent Pl'ff in Error, *vs.* The People of Porto Rico. Assignment of Errors. Filed Sept. 17th, 1906.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted]31.

JAMES E. KENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF PORTO RICO, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

N. B. K. PETTINGILL,
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Attorneys for the Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 26008

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 291.

JAMES E. KENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF PORTO RICO, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

The plaintiff in error, being a citizen of the United States and of the State of New York residing in Porto Rico, was on the 23d day of May, A. D. 1904, attempted to be charged by a criminal information filed in the District Court for the Judicial District of San Juan, Porto Rico, by the fiscal or prosecuting attorney of that court with the crime of *"abuso de confianza,"* as it is called in Spanish, a literal translation of which is "abuse of confidence" and the definition of which in the Code shows that it very nearly corresponds to the English "embezzlement." The wording of this charge is interesting at the very outset for its inartificiality, its ambiguity, and its many deficiencies, as can be seen from the

copy printed on page 2 of the printed record. It is not to be inferred that these characteristics result from the use of English by one not master of the language; the original was in Spanish, and that which is reproduced in the record is a translation made by the expert official interpreter of the Supreme Court of Porto Rico.

The defendant below, plaintiff in error here, was arraigned after his arrest on May 23d, 1904, but was allowed until the 28th of the same month to plead (Record, page 3), on which day he entered the plea of "not guilty." Thus the matter stood until the 18th day of August, 1904, when he obtained counsel other than that appointed by the court and sought permission to file a motion to quash the information, which permission was granted and motion filed (Record, page 11), and on the same day argued, considered, and overruled (page 12). The defendant then, on September 10, 1904, through his counsel, presented a plea in abatement to the information (pages 12 and 13), which was the same day overruled (pages 14-16).

On the last-mentioned day, September 10, 1904, defendant was tried on said information before a petit jury summoned according to the local laws, and a verdict of guilty was promptly returned (page 4), and the defendant sentenced to three years at hard labor in the penitentiary of Porto Rico (page 8). From this judgment and sentence an appeal was then taken to the Supreme Court of Porto Rico, where a judgment was rendered on March 5, 1906, confirming the judgment of the court below (page 78), and from this last judgment a writ of error has been duly prosecuted to this court (pages 80-85).

The present counsel of plaintiff in error did not represent him in the courts below, and only a small part of the evidence produced in the trial court is preserved in the record—that is, only those parts pertinent to the saving of the exceptions; but it appears sufficiently from the allegations of the information and the items of evidence preserved that the plaintiff in error was an employee of the Treasury Depart-

ment of Porto Rico, in which one B. R. Dix was the assistant treasurer; that said Dix was also the treasurer of a certain Union Club of which Kent was a member, and that the former imposed upon the latter the labor of handling a part of the funds of the Union Club which it was Dix's duty as treasurer of that club to hold in custody; that at some time thereafter, and shortly before the arrest of defendant, Dix discovered, as he supposed, that the funds of the Union Club in his hands were short, accused defendant of being responsible therefor, and had him charged with the alleged crime in this information specified. The lack of all the evidence in the record is partly supplied by the long recital of facts in the opinion of the Supreme Court of Porto Rico; but we need not go into details, as the errors assigned are upon broad principles and questions of practice which are unaffected by whatever may be the conclusions drawn by the first appellate court from the evidence.

The following are assignments of error:

Assignments of Error.

1. The said Supreme Court erred in sustaining the ruling of the trial court denying the motion of defendant, now plaintiff in error, to quash the criminal information filed against him.

2. The said Supreme Court erred in sustaining the ruling of the trial court overruling defendant's plea in abatement to said information.

3. The said Supreme Court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting one B. R. Dix, a witness for the People, to answer against the objection of defendant the question "As treasurer (of the Union Club) what are your duties?" and allowing the answer thereto to go to the jury as evidence.

4. The said Supreme Court erred in not sustaining the exception taken by defendant in the trial court to the ruling

of that court in permitting said witness, B. R. Dix, to answer against the objection of the defendant the question "Had you any agreement or did you confer any duty upon the accused with reference to that Club?" and allowing the answer thereto to go to the jury as evidence.

5. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting said witness, B. R. Dix, to answer against the objection of defendant the question "Explain what passed between you and Kent" and allowing the answer thereto to go to the jury as evidence.

6. The said court erred in sustaining the ruling of the trial court allowing the answer of said witness, B. R. Dix, to the question quoted in the last assignment to go to the jury as competent evidence in said cause.

7. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting said witness, B. R. Dix, to answer against the objection of defendant the question "To what amount did the fraud ascend?" and allowing the answer thereto to go to the jury as evidence.

8. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in not excluding from the consideration of the jury the answer of said witness to the question quoted in the last previous assignment for the reasons then stated in defendant's objection thereto.

9. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting said witness, B. R. Dix, to answer against the objection of defendant the question "What was his (Kent's) object in sending you this document? What did it say?" and allowing the answer thereto to go to the jury as evidence.

10. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that

court in permitting said witness, B. R. Dix, to answer against the objection of defendant the question as to a certain book described as a "cash book," "Are there any entries in that book and any signatures alongside of those entries?" and to continue testifying as to the contents of said book against the further objection of defendant, which testimony was allowed to go to the jury as evidence.

11. The said court erred in not sustaining the exception taken by defendant in the trial court to the refusal of that court to strike out the testimony of said witness, B. R. Dix, as to the contents of the "cash book" aforesaid as contained in the following questions and answers, to wit:

Q. On the 21st of March, adding the amounts delivered from the 13th to the 21st, what is the total of entries in this book?

A. From the 13th to the 21st inclusive, one hundred and fifty dollars and sixty-five cents.

Q. What expenses did the Union Club have from the 13th to the 21st?

A. Twenty-three dollars and seventy-five cents.

Q. So that the balance is a total of——

A. Of one hundred and twenty-nine dollars and thirty-one cents, after deducting expenses.

12. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in admitting in evidence against the objection of defendant a certain letter, dated May 12, 1904, addressed to said witness B. R. Dix and signed by the defendant and designated as a confession, and allowing the same to go to the jury.

13. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court in permitting one H. Peterson, a witness for the People, to answer against the objection of defendant the question "Do you know that Mr. Dix conferred the duties of treasurer (of the club) upon any other person?" and allowing the answer thereto to go to the jury as evidence.

14. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court denying defendant's motion, made at the conclusion of the case of the People, that the jury be instructed to return a verdict of not guilty.

15. The said court erred in not sustaining the exception taken by defendant in the trial court to the ruling of that court denying defendant's motion, made at the close of all the evidence, that the jury be instructed to return a verdict of not guilty.

16. The said court erred in not sustaining the exception taken by defendant to that part of the charge of the judge of the trial court to the jury, which explained the definition of the crime of embezzlement or *"abuso de confianza"* in the following words:

> "Counsel for the defense has raised the question that the Spanish version does not correspond exactly with the English version. In the English text of Section 445 the word *embezzlement* is used, which is translated in the Spanish code as *abuso de confianza* (abuse of confidence.) On page 215 in the second column of the Diccionario Ingles-Español y Español-Ingles by J. M. Lopez and E. R. Bensley the word *embezzlement* is translated as 'Hurto, robo, el acto de ocultar á Hurtadillas alguna cosa puesta al cuidado de uno con intencion de apropriarsela' (theft, robbery, the act of taking by stealth anything placed in the keeping of a person, with the intention of appropriating the same), and the word *embezzler* is translated as 'malversador, autor de un abuso de confianza' (one who misapplies property, author of an abuse of confidence) and other peculiar definitions. And in a dictionary all in English which we shall translate with the assistance of the interpreter of this court; that is to say the Standard Dictionary of the English Language, published by Funk & Wagnalls Company, New York and London, 1900, we find on page 590, in the second column, in defining the word *embezzlement,* the following: 'To appropriate or apply fraudulently to one's own benefit

moneys or merchandise which have been officially or privately placed in his custody.'

"We think, then, that there is no question whatever on the part of the court; we submit to you the law just as it appears in the Spanish edition of our Code, which is certified to be a true and exact copy by the Secretary of Porto Rico, together with the foregoing explanation."

17. The said court erred in not sustaining the exception taken by defendant in the trial court to the form of the verdict rendered against defendant by the jury and in not holding the same null and void.

18. The said court erred in not sustaining the exception taken by defendant in the trial court to the validity of the sentence imposed upon him by virtue of the verdict rendered against him and in not declaring said sentence null and void.

19. The said court erred in not reversing the judgment of the trial court and remanding this cause for a new trial in the court below because of the failure of the judge thereof in his charge to the jury to comply with the provisions of Section 266 of the Code of Criminal Procedure of Porto Rico, in this, to wit: that he did not explain to said jury the meaning of Section 448 of the Criminal Code which defines the classes of persons who may be guilty of embezzlement so that said jury might properly and legally determine whether defendant was included within any of such classes.

20. The said court erred in not reversing the judgment of the trial court because of the further failure of the judge thereof in his charge to the jury to comply with the provisions of said Section 266 of said Code of Criminal Procedure, in this, to wit: that he did not explain to said jury that, in case they should find that said defendant was a co-owner of the funds alleged to have been embezzled, he could not be found guilty of the crime charged.

21. The said court erred in not reversing the judgment of the trial court because of the further failure of the judge thereof in his charge to the jury to comply with the provisions of said Section 266 of said Code of Criminal Procedure, in this, to wit: that he did not explain to said jury that, the funds in question being alleged to belong to the Union Club, the defendant could not be convicted under the information unless they should find from the evidence that said funds were confided to defendant by said Union Club or under authority conferred by it.

22. The said court erred in not reversing the judgment of the trial court because of the further failure of the judge thereof in his charge to the jury to comply with the provisions of said Section 266 of said Code of Criminal Procedure, in this, to wit: that he did not explain to said jury the circumstances under which an extrajudicial confession would be null nor the conditions which must be present in order that such confession might be legally considered as evidence, so that the jury might form an intelligent and legal conclusion as to whether they should consider the so-called confession submitted to them.

23. The said court erred in holding by its decision as to the admissibility of the so-called confession of defendant that the Fifth Amendment to the Constitution of the United States "is the foundation of all laws and the basis of all judicial decisions guarding the rights of the accused in the admission of confessions to be used against him in a trial for crime. * * * Compulsion is the key of the prohibition. If there is no compulsion the confession does not fall within this constitutional inhibition."

24. The said court erred in not reversing the judgment of the trial court because of the further failure of the judge thereof in his charge to the jury to comply with the provisions of said Section 266 of said Code of Criminal Procedure, in this, to wit: that upon admitting before them the so-called confession of the defendant he left it to them to

consider from all the evidence upon that point whether the same had been freely and voluntarily made without threat, inducement or hope of reward and, in case they found it had not been so made, they should exclude it from their minds in forming their verdict; and in holding by its opinion and decision that the action taken by the trial judge "practically amounted to such instructions."

25. The said court erred in holding as matter of law that the evidence touching the circumstances surrounding the making of the so-called confession of defendant, as recited in its own decision, did not bring said confession within the spirit of the inhibitions fixed by the precedents cited therein.

26. The said court erred in deciding the question of the proper admission of the so-called confession in evidence solely upon consideration of the testimony of the prosecuting witness Dix on the one side and of defendant Kent on the other, and excluding from its consideration the testimony of the witness Dexter which was very material upon that issue.

27. The said court erred in affirming the judgment of the trial court and in not reversing said judgment and remanding same with instructions to grant defendant a new trial.

ARGUMENT.

I.

The first assignment of error questions the sufficiency of the indictment as against the motion to quash the same, which is found on page 11 of the printed record, the ruling of the trial court thereon being found on page 12 and the portion of the opinion of the appellate court referring to it on pages 46-50, the grounds of which may for discussion be condensed into the following points:

(*A*) That the information was bad in form, because it did not comply with section 153 of the local Code of Criminal

Procedure, which section refers back to sections 71, 72, and 73 of the same Code. Section 71 is in the following words:

> "The information must contain:
> "1. The title of the action, specifying the name of the court to which the same is presented and the names of the parties.
> "2. A statement of the acts constituting the offence, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

The language of the information, found, as before stated, on page 2 of the record, is rather vague and confusing. It does not make clear whether the confiding by Dix in Kent was as an employee or as a friend; nor whether such confiding was or was not with the consent of the Union Club; nor whether the sum of money mentioned as "taken, applied, and appropriated" by said Kent was the same confided to him by Dix or some other money of the said club. But we need not dwell long in argument over this point, because these defects assume upon another ground a seriousness which will demand the court's attention.

(*B*) That it is uncertain from the wording of the information whether larceny, or embezzlement, or both, are attempted to be charged.

What has been above said indicates the basis for this ground of the motion. Where two crimes are as similar as larceny and embezzlement, it is incumbent on the pleader to make clear to a particular intent which one the defendant must answer. Here the pleader starts out by naming the crime of embezzlement, and he goes so far as to show (provided the character of his employment was more specifically described) that defendant Kent was in a position where he might have committed embezzlement; but he fails to go further and allege that defendant really did commit any embezzlement, because he proceeds to allege the money to be

the property of another than Dix, the party who confided it to defendant, and there is no allegation that the money taken and appropriated by defendant was in any part identical with that alleged to have been confided by Dix to Kent. He merely says that Kent took and appropriated a certain sum of money which belonged to the club and had been collected from members under the authority of Dix, but whether collected by Kent, by Dix, or by some other person, the pleader is silent. If collected by Kent, the taking might, other necessary elements being present, constitute embezzlement; but if collected by Dix or another and taken by Kent from them, then it would as clearly be a larceny, if anything. It seems to us, therefore, that the objection on this ground is well taken.

United States *vs.* Carll, 105 U. S., 611.

(*C*) That the facts alleged in the information, taken to be true, did not constitute the crime of embezzlement, with which defendant was charged.

The preliminary paragraph of the information recites "embezzlement under section 448 of the Penal Code." Turning, then, to said section for the definition of that crime, we find the following:

> "SECTION 448. Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise entrusted with or having in his control property for the use of any other person who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

Do the allegations of the information bring the defendant within the terms of this statute? We think not.

(1) The defendant is not shown to have been either a trustee, banker, merchant, broker, attorney, agent, assignee

in trust, executor, or administrator. These terms are all of well-known definition and imply a trust relation resulting from a well-known occupation or course of business. It will hardly be claimed by counsel for The People that either of them cover the relations between the defendant and Dix as described in the information.

People *vs.* Allen, 5 Denio, 76.

(2) It is more likely to be claimed that defendant may be properly included in the term "collector" as used in the statute; but this term involves no more than one species of agency, and we submit that in order to be included in any one of the capacities described, and especially in that of "collector," there must be alleged a direct relation of agency and appointment between the person so described and the owner of the thing alleged to have been embezzled by such "collector," and in addition there must be some legal consideration for the obligation to collect and account, in order that a violation of the obligation may be embezzlement.

Here the money was alleged to be the money of the Union Club, and Dix its proper custodian by virtue of his office of treasurer of that club; that is, the club had "confided" the possession of the money to Dix. Where is the allegation that said club had authorized or consented that Dix should "sub-confide" the same possession to Kent? There is none. The idea of Dix to induce Kent to perform duties which Dix was in duty bound to perform himself was evidently one of those assignments of labor which so often occur without the principal's knowledge or consent. Therefore Kent was not, and could not be, the "collector" of the Union Club or sustain any relation of trust or confidence with them; that club had not even knowledge that he was collecting funds for it, if, indeed, he did collect any; hence Kent could not be guilty of any "*abuso de confianza*," so far as the moneys of that club are concerned. The only

trust, if any, conferred was by Dix on Kent, and that was a trust which Dix was not authorized to confer; hence the alleged possession of the money by Kent never was rightful or authorized by its owner, but was from its inception unauthorized and tortious, and the violation of law, if any there was, constituted larceny and not embezzlement or *"abuso de confianza."*

United States *vs.* Northway, 120 U. S., 327.
State *vs.* Johnson, 21 Tex., 775.

In other words, to sum it up according to the allegations, Dix confided the money to Kent; the money belonged to the Union Club; the taking by Kent defrauded the Union Club. If Dix had been defrauded, it would have been embezzlement; the defrauding of the Union Club could be only larceny. Embezzlement of the property of the Union Club could only have been charged against Dix, because to him, and him only, had that club "confided" its custody and control.

United States *vs.* Hartwell, 6 Wall., 385.
State *vs.* Roubles, 43 La. Ann., 200.

In the exhaustively considered case of Moore *vs.* United States, 160 U. S., Mr. Justice Brown, speaking for the court, says on page 271:

> "The cases reported from the English courts and from the courts of the several States have usually arisen under statutes limiting the offense to certain officers, clerks, agents or servants of individuals or corporations, and the ruling that the agency or fiduciary relation must be averred, as well as the fact that the money embezzled had come into the possession of the prisoner in that capacity, are not wholly applicable to a statute which extends to every person, regardless of his employment, or of the fact that the money had come into his possession by virtue of any office or fiduciary relation he happened to occupy. These cases undoubtedly hold, with great uniformity,

> that the relationship must be averred in the exact terms of the Statute; that the property embezzled must be identified with great particularity; and that it must also be averred to have come into the possession of the prisoner by virtue of his *fiduciary relation to the owner of the property.*"

And the court cites, among other cases:

Com. *vs.* Smart, 6 Gray, 15.
State *vs.* Stimson, 24 N. J. L., 9.

Moreover, in order to constitute embezzlement, the possession of the defendant, under a statute like the above, must be under an obligation involving some legal consideration. It is not enough that the possession be gratuitous or for the doing of some service as a matter of favor. This principle is as old as the crime of embezzlement itself, which is but a modern and statutory offshoot of the common-law crime of larceny.

Wharton, Crim. Law (10th ed.), secs. 1010, 1012, 1014.
Rex *vs.* Tyree, L. R., 1 C. C., 177; 11 Cox C. C., 241.
Shelburne *vs.* Com., 1 Cr. & M., 675.

(3) That the making of these allegations with exactness and particularity is not matter of form, but of vital substance, and so recognized by this court, is shown by a further extract from the opinion in Moore *vs.* United States, above quoted, which is as follows (page 274):

> "For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employee of the post-office be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since the defendant might be held for

> property received in a wholly different capacity—such, for instance, as a simple bailee of the government."

This is exactly applicable to the information in the case at bar. For all that appears, defendant sustained no relation of trust, nor any relation described under the different classes of persons enumerated in the statute, to the owner of the money; nor did he even to Dix; he was not even an employee of Dix, but as to him was a gratuitous bailee, collecting money as a favor, its non-payment resulting in the creation of an indebtedness and not an embezzlement.

Bishop's New Criminal Law, vol. 2, p. 348.

The remaining language of section 448, describing the persons who can be guilty of embezzlement, is that general phrase so common in such connections—"or person otherwise entrusted with or having in his control property." But the doctrine of *noscitur a sociis* is applicable to restrain this general phrase from covering other than relations of the same characteristics as those specified, and it is further subject to the same argument applied to the term "collector," that no relation of trust is alleged between the defendant and the owner of the property, or any one having authority from such owner, to create the trust.

The Supreme Court of Porto Rico, in its opinion on appeal, rightly says that our Penal Code and Code of Criminal Procedure were derived from the corresponding codes of California, and hence should generally be construed as the courts of that State have construed like provisions; but the learned judge who wrote the opinion was only able to support his conclusion as to the sufficiency of this information by one decision of the Supreme Court of California, to wit, People *vs.* Page, 116 Cal., 386, and that learned judge goes on to say that in the Page case the indictment was "very much like the one before us now," and that "this indict-

ment was held sufficient on an objection almost identical with the one made here." Upon examination of the Page case it will be discovered that the defendant was the guardian of an insane person, and held the money of the insane person upon the trust resulting from that relationship, and was accused of embezzlement of said money from said insane person. It will also be discovered that the objection taken to the indictment in that case was only that the particulars as to the character of the guardianship, the state of the accounts between guardian and ward, and other details of that sort were not specifically alleged. We fail to see even a similarity in the principles involved, and the language of the court above referred to seems simply to show that the learned judge had failed to read carefully the grounds of the motion and the brief filed in support thereof or was obtuse to the principles invoked for the due protection of the rights of the defendant.

We submit, therefore, that the information was subject to the objections taken to it by the motion to quash, and the same should have been granted.

II.

The second assignment questions the correctness of the ruling disallowing the plea in abatement to the information, which is found on pages 12 and 13 of the record, the ruling of the trial court thereon being found on pages 14-16 and the portion of the opinion of the appellate court referring thereto on pages 51-54.

This plea in abatement raised two questions, viz., the legality of the constitution of the trial court with one judge instead of three, and the right to prosecute for an infamous crime by way of information and without a presentment by a grand jury. As we consider the latter contention to have been settled by the decisions of this court in the Mankichi

and Dorr cases, 190 U. S., 197, and 195 U. S., 138, we shall discuss only the former.

The question of the proper constitution of the trial court depends upon the construction of certain provisions of the "civil government act" of Porto Rico, approved April 12, 1900 (31 Stat. at Large, 77), and a certain act of the Legislative Assembly of Porto Rico subsequent thereto. The pertinent portions of the act of Congress are the following:

> "SECTION 15. That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act, as it may from time to time see fit."
>
> "SECTION 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality thereof, not inconsistent with the provisions hereof;" * * *
>
> "SECTION 33. That the judicial power shall be vested in the courts and tribunals of Porto Rico as already established and now in operation, including municipal courts, under and by virtue of general orders, numbered one hundred and eighteen, as promulgated by Brigadier General Davis, United States volunteers, August sixteenth, eighteen hundred and ninety-nine, and including also the police courts established by general orders, numbered one hundred and ninety-five, promulgated November twenty-ninth, eighteen hundred and ninety-nine, by Brigadier General Davis, United States volunteers, and the laws and ordinances of Porto Rico and the municipalities thereof in force, so far as the same are not in conflict herewith, all of which courts and tribunals are hereby continued. The jurisdiction of said courts and the form of procedure in them, and the various officials and attachés thereof, respectively, shall be the

same as defined and prescribed in and by said laws and ordinances, and said general orders numbered one hundred and eighteen and one hundred and ninety-five, until otherwise provided by law: *Provided, however,* That the Chief Justice and associate justices of the Supreme Court and the marshal thereof shall be appointed by the President, by and with the advice and consent of the Senate, and the judges of the district courts shall be appointed by the governor, by and with the advice and consent of the executive council, and all other officials and attachés of all the other courts shall be chosen as may be directed by the Legislative Assembly, which shall have authority to legislate from time to time as it may see fit with respect to said courts, and any others they may deem it advisable to establish, their organization, the number of judges and officials and attachés for each, their jurisdiction, their procedure and all other matters affecting them."

The subsequent act of the Legislative Assembly of Porto Rico referred to is that approved March 10, 1904 (Laws and Code of Civil Procedure, 1904, page 103), which is entitled "AN ACT REORGANIZING THE JUDICIARY OF PORTO RICO, DETERMINING THE NUMBER OF JUDICAL DISTRICTS, PROVIDING THAT ONE JUDGE SHALL CONSTITUTE A COURT TO TAKE COGNIZANCE OF ALL CASES AND FIXING THE SALARY OF THE JUDGES, TO CREATE MUNICIPAL COURTS AND DEFINING THEIR POWERS, JURISDICTION AND SALARY OF THE JUDGES, AND PROVIDING AN EXECUTIVE OFFICER FOR THE SAME, AND FOR OTHER PURPOSES," of which the pertinent portions are the following:

"SECTION 1. That the territory of Porto Rico is hereby divided into seven judicial districts, as follows:" (describing the capital of each and its territorial limits).

"SECTION 2. Each district judge shall have the following qualifications:" (describing them). "One judge shall constitute a district court." * * *

By a perusal of section 33 of the act of Congress above quoted, it will be seen that the first clause of that section provided for the continuance of the system of courts established by general orders No. 118, of August 16, 1899, as well as certain other inferior courts. Referring, then, to the above general order, we find the following:

> "Upon the recommendation of the judicial board, the following reorganization and functions of the judiciary of this island were approved August 10, 1899, and are published for the information and guidance of all concerned:
>
> "1. The organization and functions of the courts of justice of this island will, from the 10th instant, undergo reforms in accordance with the following dispositions:
>
> "2. There shall be a Supreme Court of Justice," etc.
>
> "3. The island is divided into five judicial districts, whose respective seats shall be San Juan, Ponce, Mayaguez, Arecibo and Humacao."
>
> 4, 5, 6, 7, and 8 give the limits of the respective districts.
>
> "9. Justice in civil and criminal matters will be administered in each district by a court established in its respective capital. These courts will have exclusive jurisdiction and public oral trial of all classes of civil and criminal matters, under the forms and procedure established further on in this general order.
>
> "10. Each district court will be composed of three judges, one of whom shall be presiding judge, and who jointly shall constitute a bench for civil and criminal business."
>
> * * * * * * *
>
> "15. The criminal business transferred from the abolished courts shall be proceeded with by the district courts."

The remainder of the order refers to procedure and responsibility of the judges.

It therefore appears that the act of the Legislative Assembly of March 10, 1904, above quoted from, absolutely

abolished the system of district courts established by the above general order and created another system, differing in many details and in the following fundamentals, viz., one judge in place of three, seven courts in place of five, with consequent change of territorial limits and of identity of districts. Had the Congress given authority to the Legislative Assembly by virtue of any of the foregoing provisions of the civil government act to make these sweeping changes which in effect amounted to the abolition of the district courts established in 1899 and recognized by section 33 aforesaid? We submit that it had not.

We do not question the right of the Legislative Assembly to repeal, amend, or alter any of the old laws of Porto Rico or the military general orders, with the limitation contained in section 32, that such action must not be "inconsistent with the provisions" of said civil government act; but we do contend that their power over the Supreme and district courts was limited by section 33 of that act. It is therefore necessary to make a critical examination of the provisions of that section. It first describes the courts as constituted by reference to the general orders which established them, and then says: "all of which courts and tribunals are hereby continued." It then continues: "The jurisdiction of said courts and the form of procedure in them, and the various officials and attachés thereof, respectively, shall be the same as defined and prescribed in and by said laws and ordinances, and said general orders numbered one hundred and eighteen and one hundred and ninety-five, *until otherwise provided by law,*" which is followed by a proviso regulating the manner of appointment of the Supreme and district judges by the President and governor respectively; and it then continues: "and all other officials and attachés of all the *other* courts shall be chosen as may be directed by the Legislative Assembly, which shall have authority to legislate from time to time as it may see fit with respect to *said* courts, and any others they may deem it advisable to es-

tablish, their organization, the number of judges, and officials and attachés for each, their respective jurisdiction, their procedure, and all other matters affecting them."

We submit that the power to destroy the identity of the Supreme and district courts is nowhere in this section entrusted to the Legislative Assembly, for two reasons:

(*A*) The word *said*, italicized in the above quotation, must both by grammatical rules and by reason be held to refer to the "other courts" over which the legislature is given power to provide for officials and attachés. By grammatical rules, because the "other courts" are the last group of courts mentioned. By reason, because the evident intention of the act is to recognize superior and inferior groups or classes of courts, one of which was given over to the control of the legislature and the other reserved for the control of Congress. If Congress specifically provided for and controlled the manner in which judges of these two courts should be appointed, it is more than natural to conclude that it also intended to control the changes which might be proposed as to their power and jurisdiction? The system of courts with three judges and without a jury have been long established in the Spanish jurisprudence, and if the system of laws was to be continued for trial, why would it not be logical to continue also the system of organization of its courts?

Again, the meaning contended for is carried out by the provision as to "any others they may deem it advisable to establish," joined with the phrase "said courts." This seems to us to indicate clearly that "said courts" referred to "all the other courts" then in existence, to which were added "any others they may deem it advisable to establish;" and over this inferior class of courts *in esse* and *in posse* the Legislative Assembly might legislate from time to time as to "their organization, the number of judges and officials and attachés for each, their jurisdiction, their procedure, and

all other matters affecting them." The first part of the section refers to *all the courts;* the next part to the Supreme and district courts only; the third part concededly to the inferior courts; then, as there is no stop in the punctuation, no indication of a change of subject-matter or of recurrence to the earlier parts of the section, we submit that the fourth and last part must be held to be confined in its effect to the part immediately preceding it.

(*B*) Even if the language of the last part of said section 33 could be held to refer to all the courts, still no power to abolish entirely the district courts as then existing and supersede them by a wholly new system, changing the number and destroying their identity, is conferred by that language. The power is limited to legislating as to their (1) organization, (2) number of officials, (3) jurisdiction, and (4) procedure; in other words, so far as the courts then in existence were concerned, to make such *changes* as might seem expedient. But, on the other hand, if the power were construed to include such destruction and rebuilding as were provided for by the act of the Legislative Assembly in question, it must also be held to include the power to destroy and not rebuild it, or to destroy and transfer the same functions to the Supreme Court or to one or more new courts which might have been called circuit courts or probate courts. It cannot avail that the legislature saw fit to name the new system by the same name. If it could change five districts to seven, it might by the same token change the number to three, to two, even to a single one, or as above suggested, abolish them altogether. Pressing the argument to its logical conclusion, it seems impossible to escape the conviction that the Legislative Assembly may also exercise the same powers over the Supreme Court—may change its organization, its jurisdiction and the number and term of its judges, and even abolish it altogether—although those judges are by the same section to be selected and appointed by the President of the

United States. Such results cannot have been within the intention of the Congress, nor, we submit, does the language so imply.

The Supreme Court of Porto Rico largely based its conclusion adverse to defendant's contention upon the meaning of the phrase "until otherwise provided by law," holding that said phrase must mean a law of the Legislative Assembly (Record, page 53), and says that phrase would otherwise be "useless and a mere waste of words." This court, however, did not take that view of a similar provision in the organic act of the Territory of Utah, which came before it for construction in the case of Ferris *vs.* Higley *et al.*, 20 Wall., 375 That was a case involving the determination of the jurisdiction of probate courts as determined by an act of the legislature, and the question was whether such act was inconsistent with the provisions of the organic act of the Territory. The organic act of Utah provided that the power of the territorial legislature should "extend to all rightful subjects of legislation consistent with the Constitution of the United States and with that act"—an even broader grant than ours. Touching the judicial system, the organic act made the following provision:

> "The judicial power of the Territory shall be vested in a Supreme Court, district courts, probate courts and justices of the peace" (prescribing the organization and number of the district courts and the manner of appointment of the judges).
>
> "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as *limited by law: Provided,* That justices of the peace shall not have jurisdiction of any matter in controversy where the title and boundary of lands may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars, and the said Supreme and district courts respectively shall possess chancery as well as common-law jurisdiction."

In the face of these organic provisions, the territorial legislature proceeded to exercise its supposed authority to "limit by law" the jurisdiction of the probate courts, which it did by giving them general, common-law and chancery jurisdiction, thus making them in all respects co-ordinate with the district courts—and it was the validity of this act which was in question. This court, speaking through Mr. Justice Miller, thus discussed the general subject:

> "Looking, then, to the purpose of the organic act to establish a general system of government, and its obvious purpose to say what courts shall exist in the Territory, and how the judicial power shall be distributed among them, and especially to the fact that all ordinary and necessary jurisdiction is provided for in the Supreme and district courts, and that of the justices of the peace, and that the jurisdiction of the probate court is left to rest on the general nature and character of such courts as they are recognized in our system of jurisprudence, is it not a fair inference that it was not intended that that court should be made one of general jurisdiction—that it should not be converted into a court in which all rights, whether civil or criminal, whether of common law or chancery cognizance, whether involving life, or liberty, or property, should be lawfully tried and determined?"

Justice Miller then proceeded to explain the meaning of the phrase "as limited by law" in the following language, very pertinent to our present contention:

> "It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the 9th section of the organic act already cited, that the jurisdiction of the several courts therein provided for, 'shall be limited by law.' The argument is that this refers to laws to be thereafter made by the territorial legislature, and that as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in

> deciding what law is meant in this phrase, 'as limited by law,' we are wholly to exclude laws made by the legislature of the Territory. There may be cases when that Legislature conferring new rights, or new remedies, or establishing anomalous rules of proceedings within their legislative power, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the probate courts may be more specifically defined by territorial statutes within the limit of the general idea of the nature of probate courts, or that certain duties not strictly of that character may be imposed on them by that legislation."

The decision then proceeds to decide that such a radical change as giving a probate court general jurisdiction cannot be included within the power granted. So in the Porto Rican Statute, in the creation of new courts or the application of new remedies, as well as with respect to the inferior courts already established, the Legislative Assembly can "provide by law" any change it may deem wise; but it cannot destroy or fundamentally change what Congress has provided for.

It therefore seems clear that the Supreme Court of Porto Rico erroneously construed the meaning of "until otherwise provided by law," as used in section 33 of the Porto Rican act, and that a construction holding "law," as there used, to mean a law of Congress would not result in rendering the phrase "useless and a mere waste of words."

It may be argued that this contention has been decided adversely by this court in Dones *vs.* Urrutia, 202 U. S., 614; but that was a case where the jurisdiction was collectively attacked by *habeas corpus* and the citation in the memorandum decision of *Ex parte* Ward, 173 U. S., 454, shows that the decision rested principally upon the ground that a question of this kind could not be examined into upon a *habeas corpus* proceeding.

So far as it may have been rested upon the case of United States *vs.* Bellingham Bay Boom Co., 176 U. S., 214, wherein it is held that the construction of a State statute by the highest court of a State is conclusive upon this court, it is evidently a misapprehension, as what was there questioned and what we are questioning is not the construction of the act of the Legislative Assembly of Porto Rico, but of section 33 of the civil government act passed by the Congress; and then Porto Rico is not a State, if even a Territory, and Congress has reserved to itself the power of annulling its local laws if deemed advisable (civil government act aforesaid, section 31).

The limits of the rule as to conclusiveness of construction even by State courts were clearly expressed by this court in Norton *vs.* Shelby County, 118 U. S., 425, as follows:

> "Upon the construction of the constitution and laws of a State, this court, as general rule, follows the decisions of the highest court, unless they conflict with or impair the efficacy of some principle of the Federal Constitution, or of a Federal statute, or a rule of commercial or general law."

Here there is no law of a State, but an enactment of a Territorial legislature which is claimed to be unauthorized by and contrary to the terms of the organic act—that is, regarding the organic act as a constitution *pro tanto*—unconstitutional. That constitution being the work of Congress, this court cannot fall back upon the construction which may have been put upon it by the highest territorial court, but give this defendant, now plaintiff in error, the benefit of its own consideration and judgment.

We are not unmindful of the argument which may be attempted to avoid the consequences of a finding that the above act of the Legislative Assembly of Porto Rico is void so far as it affected the district courts, to the effect that, whether the court was legally constituted or not, the judge was a

judge *de facto*. But we submit that the rule of *de facto* officials is not applicable to the question here involved. That rule is applied where there is some doubt of the regularity of the appointment, where there is more than one claimant to the office, and other kindred circumstances involving the personality of the incumbent; but here it goes altogether deeper. If a law really remained in force which provided for three judges, it is evident that no court could be legally held by one judge, though appointed in the very manner provided for the three judges. If the law entitled a defendant to the combined wisdom of three, it cannot be said that the wisdom of one is the same. That question goes, not to the personality or manner of appointment of the judge, but to the very foundation of the organization of the court.

This contention can find, and needs, no stronger support than the reasoning and conclusion of this court in the above-cited case of Norton *vs.* Shelby County, 118 U. S., 425, from which the following paragraphs may be extracted as a conclusive statement:

> "Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel; but, when read in connection with the facts, they will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanction the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbent are entitled to consideration as the valid acts of a *de facto* officer. Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of its acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. * * *
>
> "None of the cases cited militates against the doctrine that, for the existence of a *de facto* officer, there must be an office *de jure*, although there may be loose

expressions in some of the opinions, not called for by the facts, seemingly against this view. Where no office really exists, the pretended officer is merely a usurper, to whose acts no validity can be attached; and such, in our judgment, was the position of the commissioners of Shelby county who undertook to act as the county court, which could be constitutionally held only by justices of the peace. Their right to discharge the duties of justices of the peace was never recognized by the justices, but from the outset was resisted by legal proceedings, which terminated in an adjudication that they were usurpers, clothed with no authority or official function."

To this may be added the following:

State *vs.* Fritz, 27 La. Ann., 689.
Ex parte Snyder, 64 Mo., 58.
People *vs.* Toal, 85 Cal., 333.

We therefore submit that the plea in abatement of the information was good upon the first ground, as to the organization of the court, and should have been sustained; hence that the Supreme Court of Porto Rico also committed error in not so holding, for which the judgment should be reversed and the information ordered dismissed.

And if anything in the Dones case, above referred to, indicates a contrary conclusion, we earnestly urge this court to give the subject a reconsideration in the light of reason and of the foregoing authorities, as we believe, although we have not seen the briefs submitted, that it could not have been properly and exhaustively presented, or that the consideration of this court was confined to the other points involved.

III, IV, VII, VIII, IX, X, XI, AND XIII.

The fifth and sixth assignments of error are waived by defendant, and the third, fourth, seventh, eighth, ninth, tenth, eleventh, and thirteenth assignments, being all to im-

proper rulings upon the admission of evidence, may be considered under one head.

The third assignment relates to the overruling of an objection to the question asked the prosecutor, Dix: "As treasurer (of the Union Club), what are your duties?" the ground of the objection being that the constitution of the club was the best evidence as to those duties (Record, page 17). The Union Club was alleged in the information to be "an organization established for the recreation of its members," and we think it may be presumed from that description to have had a constitution, by-laws, or some regulations, and in such case it seems clear the rules of evidence required their production; but, the same rule having been so much more flagrantly violated in regard to the failure to produce the books of account of the club, we will not dwell in argument upon this point.

The fourth error assigned was to the admission of the following question to Dix, the prosecutor: "Did you have any contract, or did you charge him (the accused) with any duty in regard to that institution in the club?" and the objection made was that it was inadmissible, as it was not shown that witness had any authority to give authority to any other person (Record, page 17). While this objection was rather awkwardly expressed, we think the principle to which it called the court's attention was correct. If Dix was not authorized by the club to make such a contract as the prosecution was trying to prove, or to confer any duty as to the matter inquired about upon any other person, then what he attempted to do without authority could not be material; hence the proof of the authority was a necessary preliminary to any evidence of what he did; and this becomes doubly important when it is borne in mind that the information charged the confidence to have been bestowed by one party and the property embezzled to belong to another.

The seventh error assigned was to the admission of the

following question to the same witness as before: "To what amount did the fraud ascend?" and the objection was made that if the books were not in evidence, statements of the witness concerning them were not evidence (Record, page 18). The few preceding questions, preserved in the record, show that the prosecutor had testified that he and one Harry had been making an examination of certain books of account "to arrive at the proper defalcation," and that counsel for defendant had already made a previous objection to statements of the witness as to contents of books which had not been offered in evidence. This is so elementary that it is hard to understand the motive of a prosecuting officer in persisting in getting before the jury secondary evidence through an interested and prejudiced witness, while the primary evidence was within easy reach, if, indeed, the books themselves would have shown what the witness claimed they did.

The eighth error assigned involves the answer to the question propounded above and subject of the last assignment. This shows that the witness, being allowed to answer, proceeded without producing a book or a line in writing of any sort to fix the amount of defalcation alleged to have been shown by these books (same page of record last referred to). It is one thing, after books or documents have been introduced in evidence, to allow a witness to explain their contents in order to aid the understanding of a jury; but to allow such explanations, followed as they were by the statements of alleged conclusions of the witness from examination of them, without their introduction in evidence, is contrary to all rules of evidence and all principles of fairness.

Philadelphia, etc., R. R. Co. *vs.* Stimson, 14 Pet., 461.
Sebree *vs.* Dorr, 9 Wheat., 558.

And the rule has been carried to the necessary and logical conclusion that the failure to produce the best evidence,

when within reach, creates a presumption that, if produced, it would not be favorable.

Clifton *vs.* United States, 4 How., 246.
Runkle *vs.* Burnham, 153 U. S., 225.

It is further shown by the paragraph at the top of page 20 of the record, to which no error was assigned because no specific question was saved, that this witness was allowed to testify to what was really his opinion as to what the books showed, while the books themselves were the best evidence and no offer was made to produce them.

The ninth assignment is the exception taken to the overruling of defendant's objection to the question, "What was his object in sending you this document? What did it say?" the ground of the objection being that it calls for an answer respecting the contents of a document. The course of the trial is well illustrated by the proceedings on page 19 of the record, where this exception is shown; and, while any one exception might not be considered of sufficient importance to warrant a reversal, the discussion over the admission of this and kindred questions serves well to show the temerity of the fiscal in overriding the rules of evidence and the bias of the court in its rulings.

The tenth and eleventh assignments refer to the allowance by the trial court of questions about a certain "cash book" which was not introduced in evidence (Record, pages 20, 21), the particular question objected to and made the subject of the tenth assignment being: "Are there any entries in that book and any signatures alongside those entries?" and the eleventh being a motion to strike out certain answers about the entries in that book, shown at the bottom of page 20 and the top of page 21 of the record. It is unnecessary to enlarge upon the questions raised by these assignments. The principles involved are plain. The only subject for consideration must be whether the rulings were prejudicial to defendant; but that result can hardly be

doubted, because, according to the version of the contents of the book given by the witness, in one short period of eight days an amount of over one hundred dollars was unaccounted for, all of which the prosecution apparently held the poor defendant responsible for, although the witness himself admitted that defendant was only one of three at least who had made entries in the book and had had access to and control of it (last sentence of paragraph 19, page 20 of Record).

The thirteenth assignment questions the ruling of the trial court in permitting a witness (Peterson) for the prosecution to answer the question, "Do you know that Mr. Dix conferred the duties of treasurer (of the club) upon any other person?" to which the defendant objected on the ground that he was incompetent to testify on that point (Record, page 29). This is another instance of the continued effort of the fiscal to prove by the opinion or oral declaration of some one a fact which could not possibly exist without the pre-existence of certain provisions in the rules and regulations of the club authorizing Dix to appoint a subtreasurer or assistant and confer upon him the duties which the club had entrusted to Dix. No attempt was made to prove the existence of any such rules or regulations, but instead some actual condition of things was attempted to be shown which practically amounted to Dix having permitted defendant Kent to do Dix's work for him. That could not make Kent responsible to the club, and could not be material in any respect to the issues at the trial; but if in any way material, it could not be proven by oral testimony, as was attempted. This assignment is similar in effect to the fourth, and the two may be considered together.

Before closing the consideration of the foregoing group of errors assigned to the admission of testimony in behalf of The People of Porto Rico against this defendant, it is interesting to inquire upon what ground the appellate court sustained these rulings, some of which we believe this court

will agree with us could not help seriously affecting defendant's standing before the jury. The appellate court considered these matters as worthy of no more than one brief paragraph (Record, page 57), and in that the language is so general as to cause a suspicion that it was used to "conceal thought." It merely states the general rules affecting objections to evidence which everybody knows and against which no contention had been made, even going so far as to cite a law passed by the Legislative Assembly of 1905 as governing a trial held in the month of September, 1904, and then contents itself with saying that "it does not appear that the rights of defendant were in any respect injured by any ruling made in regard to the testimony of the witness Dix"—an easy method of avoiding giving reasons for such remarkable rulings, as that a witness may testify as to the contents of books of account without their being introduced in evidence.

If we consider the preceding paragraph of the opinion of that court, wherein the court was able to go out of its way to give a much needed certificate of character to the witness Dix, it may help to explain why these violations of well-settled rules of evidence were passed over so lightly.

XII.

We now come to what seems to us a quite inexcusable violation of a principle as old as the common law itself, which is involved in the assignment of error numbered twelve. This was the admission, over the objection of defendant, of a certain letter, written by the prosecutor, Dix, but signed by the defendant, in which the writer (Dix) described it as a confession. Whether it is so or not is immaterial for the purposes of our discussion, although the wording of the latter portion indicates that the original purpose of Dix in drawing it was to obtain a promise of repayment from Kent of money belonging to the former which the latter had received and spent, but which constituted merely a debt between them in

the nature of a debt of honor; but, being described as a confession and being admitted to the jury as legitimate evidence proving defendant's guilt, beyond question it was considered by the jury as a confession, and upon that they founded their verdict.

As a confession, it was offered (Record, page 21), and in that light it was objected to by counsel for the defendant, because "its competency had not been established in accordance with the custom of law, inasmuch as it had not been shown to have been free and voluntary and given without promise of reward or without promise of freedom from prosecution." The court then proceeded to take evidence as to the circumstances of the signing of the document, and examined as witnesses upon that subject the prosecutor, Dix, L. D. Harry, F. H. Dexter, and the defendant (Record, pages 22 to 28). The court decided to overrule the objection and admit the document, which is found on pages 28 and 29, the exception of the defendant to that ruling being on the page last mentioned.

Was the ruling of the trial court correct? We confidently submit that it was not; that even the statement of the prosecutor, Dix, himself showed that it had been signed and delivered to him under the influence of a promise of protection and with the idea on defendant's part that he should have thirty days to repay the money claimed, in which event no accusation would be made; and in passing it may be said, though it makes no difference in the legal aspect of the affair, that this letter or document is dated May 12, 1904, and thereafter so much haste was shown that within ten days not only had the arrest been made and preliminary examination held, but also the information had been prepared for presentation to the trial court, as such presentation is dated on the 23d day of the same month, on which date defendant was called upon to plead thereto.

The very first statement made by the prosecutor, Dix, at the top of page 22 of the record is that he drew the docu-

ment in accordance with conversations previously had with defendant, but he made no explanation as to what those conversations were, or that they contained no promise of immunity, which it is later shown that he did; then, on page 23, he admits that Kent said to him at the time the document was presented for signature, "Do you wish that document to prosecute me before the courts?" and that he replied, "The books and documents of the Union Club are in such a condition that they would themselves convict you before any court." Was not that in itself a threat that he would prosecute defendant if he did not sign that document, coupled with an implied promise contained in the wording of the document that, if defendant did sign it, he should have thirty days to pay the money and there would be no criminal charge?

Continuing his examination, Dix naturally denies any promise of favor on his part, but he evidently meant by that express and positive promise, because a little further along, on page 24, when he was asked, "What was his (Kent's) object in your opinion (in signing the document)?" he replied, "As he said at that time, he desired to go and do all that he could to help me, and I presume that he signed the document in order to see if I would be a little easier on him." The examination then continued as follows:

> "A. (meaning defendant's counsel): Did you not promise him to be kinder or easier on him?
>
> "W. (meaning witness): Not at the time the document was signed.
>
> "A. When?
>
> "W. When he promised to return me the money if I would give him time to write to the United States and obtain money to replace what he had taken from me.
>
> "A. Before signing the document?
>
> "W. Yes, sir.
>
> "A. Did you not give this defendant to understand that if he signed that document he would not be prosecuted before the courts?

"W. No; a short time before I had told him, on the advice of counsel, that if he would return me the money I could promise him, but on that condition.

"A. Then he gave you that document to protect you in case your responsibility with respect to that money should at any time be questioned?

"W. He gave it to me considering that I might be easier on him and help him to get out of this, and possibly with the idea of protecting me. This is the idea of procedure as I had asked him, and in this way, I presume, he signed it."

So by degrees the truth comes out. The "idea of procedure" had been talked over between Dix and defendant in these previous conversations. Dix admits that that procedure was that defendant should sign some acknowledgment of liability, and then Dix would "be easier on him and help him out;" and he even makes the unequivocal statement that previous to the signing of this document he had, on the advice of counsel, told defendant "that if he would return me the money I could promise him" that he would not prosecute him. Is there any indication or intimation that defendant's mind had been relieved of the effect of that promise? Is not the presence in that document, written by Dix, of the request that thirty days' time might be given in which to repay a conclusive proof, not only that the previous promise was still in the defendant's mind, but also that Dix put that reference there *for the purpose* of continuing its effect and inducing the defendant to believe that the same promise still held good.

Moreover, recall the question of defendant to Dix *at the moment of signing,* "Do you wish that document to prosecute me before the courts?" and Dix's evasive answer, "The books of the club are enough to convict you." Can anything be clearer than that Dix, believing on the advice of counsel that promises previously given had no effect, was plotting to obtain from defendant a damaging document by deceiving him into believing that those promises still held good, though he

did not exactly repeat them? Is not this court convinced of that and of the further fact that the trick worked, the signature was obtained, and a conviction secured thereby might possibly have sent a young man to a penitentiary were it not for the fortunate circumstance that the legal advice upon which the prosecutor was relying was more tricky than sound, better adapted to practice before a Texas justice of the peace than where the right to liberty was to be passed upon by the Supreme Court of the United States?

During the examination of Dix the fiscal discovers that "in order to prove that the signature was voluntary I must have the witness Harry appear" (page 22, near bottom); consequently Dix is withdrawn and Harry called to the stand. His examination (page 23, top) is short and to the point, but the point turns out to be, not that he knows anything about a voluntary signing, but simply that he recognizes the signature as Kent's—something that had not been disputed—and the fiscal then puts this illuminating question: "Does not that signature of Kent's attract your attention, do you find it regular like that of a man who signs voluntarily?" and having again elicited the simple information that he knows the signature is Kent's he abandons the witness and goes back to Dix; and then the ever-dependable Dix makes the damaging admissions above quoted.

Those were the only two witnesses produced by The People upon this question of the admissibility of the "confession." It was clearly, we submit, the duty of the trial judge, upon this testimony alone, to have held the document inadmissible because not freely and voluntarily signed; but, as he made no sign of such a decision, the defendant himself and a witness, F. H. Dexter, were sworn. Mr. Dexter is a lawyer and had at one time represented the defendant, and while so representing him had had an interview with Dix in the presence of Kent relative to a written confession (page 25, bottom); and Mr. Dexter then proceeded to state:

> "During the course of this conversation reference was made by Mr. Kent to a confession; speaking with

> Mr. Dix, Mr. Kent complained that Mr. Dix was not carrying out his promise which, as Mr. Kent said, Mr. Dix had made. Then Mr. Dix said that he agreed to the promise and would stand by what he said. And as counsel at that time for Mr. Kent, with the idea that that confession had been involuntary and irregular, so that it could not be used against the defendant, and had been given by Mr. Kent under the promise that he would in consequence thereof be relieved of all criminal liability in this matter, I spoke to Mr. Dix and told him that I thought he ought not to make use of that document. Mr. Dix then said that he intended to keep his promise to Mr. Kent, but there was something about the way Mr. Dix expressed himself which made me think he did not intend to retain him, and in view of the fact that an action had been commenced which Mr. Dix could not stop, that the action of Mr. Dix must be guided by future developments * * * I can only reply stating that Mr. Dix had made that promise to Mr. Kent, but in the conversation with me and Mr. Kent on that day, after the confession had been obtained, I can only state in regard to the words of Mr. Dix that there was some reservation on his part."

Such was the material part of Mr. Dexter's statement. Then the defendant was sworn and made a full statement of the circumstances surrounding the signing of the document (page 27). While we are well aware that the declarations of defendants are, on account of interest, to be taken with caution, we submit that the statement of this defendant was supported by the terms of the letter or document itself, and, aside from it, the weight of evidence and of probability, in fact the uncontradicted evidence, was on the side of the conclusion that the document was signed under a threat of immediate prosecution in case of refusal, and under the hope of immunity in case of compliance.

Let us now review the law touching upon the admissibility of confessions. The embarrassment, if any, comes from the wealth rather than the paucity of authority, and

this is as true of the decisions of this court as of others. But each decision can only be illustrative, as it has well been said in one of the earlier cases that—

> "The admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion."
>
> Hopt *vs.* People of Utah, 110 U. S., 574, 584.

The same case thereupon lays down the general rule as follows:

> "But the presumption, upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made, either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such a person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprive him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law" (page 585).

Other cases to the same effect, founded upon varying circumstances, but consistent in the application of the rule, are the following:

Sparf *vs.* United States, 156 U. S., 51.
Wilson *vs.* United States, 162 U. S., 613.
Pierce *vs.* United States, 160 U. S., 355.

But the mine of both reason and authority is the Bram case, 168 U. S., 532, where Mr. Justice White collates all

the important cases of remote and recent days in a masterly exposition of the law upon this subject. Several of the paragraphs are so applicable to the case at bar that we must beg the indulgence of the court for calling special attention to them by quotation. The language of the standard work of Russell on Crimes is quoted by Justice White with approval, as follows:

> "But a confession in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threats or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if *any* degree of influence has been exerted.
>
> "And this summary of the law is in harmony with the doctrine as expressed by other writers, although the form in which they couch its statement may be different" (page 542, bottom).

He then quotes with approval a note to Gilham's case, 2 Moody, 194:

> "The human mind under the pressure of calamity is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by flattery or hope, or by the impression of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction." * * *
>
> "Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle, from which, under the law of nature, it was

held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the fact, the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create. The well settled nature of the rule in England at the time of the adoption of the Constitution and of the 5th amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explains the conciseness of the language of that amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law and imbedded in the 5th amendment was noticed by this court in Wilson *vs.* United States, *supra,* where, after referring to the criteria of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: 'In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort' " (162 U. S., 623).

After the exhaustive review of the authorities, the opinion recites the facts in the case of Bram, which do not need repetition here, and upon those facts decides that his alleged confession was under inducement, and discusses the reasons therefor as follows:

"But the situation of the accused, and the nature of the communication made to him by the detective,

necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind." * * *

"This is greatly fortified by a consideration of the words which preceded this language—that is, that Brown had declared he had witnessed the homicide, and that the detective had said he believed the prisoner was guilty and had an accomplice. It, in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that by so doing he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow. As said in the passage from Russell on Crimes already quoted, 'the law cannot measure the force of influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.'

"In the case before us we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record."

Thus it appears that it is not always necessary that an express and specific inducement or threat must be used; it is enough that what was said "might well have been understood as holding out" either the one or the other. We submit that the evidence of the prosecutor, Dix, himself brings this documentary evidence in the case at bar clearly within the rule so announced. Not only did Dix testify to a reply to defendant at the moment of the signing of the document which clearly implied both a threat and a promise, but he

also testified that during the previous conversations between him and the defendant he had made an express promise that if defendant would return the money claimed within thirty days, he would not prosecute; but "only on that condition," as he says.

But it is also well settled that the promise or threat need not be made at the same time as the declaration or signing of the document, in order to make the same inadmissible. Any previous promise or threat will produce the same effect, unless it is clearly made to appear that the influence thereof has been first removed.

McAdorn *vs.* State, 62 Ala., 154.
Whitley *vs.* State, 78 Miss., 255.

On the contrary, in the case at bar, as already argued, the wording of the letter or document in question contains clear proof of the intention to continue that influence and take advantage of it.

Returning again to the Bram case, *supra*, we find a valuable collection of both English and American cases, quoting the language which has in each case been held to constitute sufficient evidence of influence to render a confession inadmissible. Some of those which seem to us similar in effect to the case at bar are the following:

Regina *vs.* Thompson, 1 Leach C. C. 291, where a statement that unless accused gave a more satisfactory account of his connection with the matter charged he would be taken before a magistrate, was held to have led the accused to believe that he would not be taken before a magistrate if he confessed.

Cass's case, 1 Leach C. C., 293, note, where the prosecutor said to the accused he was in distress about his irons and if accused would tell him where they were he would be favorable to him.

Rex *vs.* Jones, Russ. & R. C. C., 142, where the prosecutor said to the accused that he only wanted his money, and if accused gave him that he might go to the devil.

Rex *vs.* Mills, 6 Car. & P., 146, where the statement to accused was that it was no use to deny it, as witnesses would swear they saw him do it.

Regina *vs.* Garner, 1 Den. C. C., 329, where accused was told it would be better for him to speak out.

Regina *vs.* Thompson, 2 Q. B., 12, where statements to prisoner "tended to make him believe it would be better for him to say something."

Berry *vs.* U. S., 2 Colo., 186, where accused was advised to make full restitution, and if he did so it would go easy with him.

Rector *vs.* Commonwealth, 80 Ky., 468, where the language was, "All I want is my money, and if you will tell me where it is, I will not prosecute you hard."

Terr. *vs.* Underwood, 8 Mont., 131, where accused was told that it would be better to tell the prosecuting witness all about it, and that the officer thought the prosecuting witness would withdraw the prosecution or make it as light as possible.

State *vs.* Drake, 113 N. C., 624, where the language was, "If you are guilty, I would advise you to make an honest confession; it might be easier for you."

To the above may be added many others, among them—

Rex *vs.* Griffin, Russ. & R. C. C., 152.

Belote *vs.* State, 36 Miss., 96.

U. S. *vs.* Richard, Fed. Cases, #16154.

Gregg *vs.* State, 102 Ala. (17 So., 321).

People *vs.* Smith, 15 Cal., 409.

Robinson *vs.* People, 159 Ill., 115.

It remains only to consider briefly the reasons given by the local appellate court for their concurrence with the trial court in the admission of this "confession." The cases cited by that court include all the important cases from this court quoted from or referred to above and others from California, all of which are consistent therewith and two of which are as strong authorities for the appellant as could be cited.

For instance, the case of People *vs.* Johnson, 41 Cal., 454 (page 67 of the record), holds not only that a confession

made under the influence of hope and fear—fear of conviction and hope of a lighter punishment—was inadmissible, but also that the presumption of such influence continued to cover a confession subsequently made; and People *vs.* Oliveria, 127 Cal., 381 (page 66), holds by inference that a promise that "it would be easier for him," if proven, would be sufficient to exclude the confession, but states that three witnesses testified against any such promise being made, while even the defendant's own evidence did not clearly show such promise had been made. Thereupon the court, apparently conceiving it was applying the principles enunciated by all these decisions, proceeds to the conclusion that "the confession in the case at bar, not falling within the inhibitions mentioned in the authorities herein quoted, was properly admitted" (page 68). Why did it not fall within these inhibitions? We can only be enlightened upon this point by the review of the evidence as it is stated to appear to that court, contained on pages 69 and 70 of the record, to which we especially invite the attention of the court and which we shall take the liberty of discussing in its relation to the evidence as actually existing.

(*A*) After relating the course of events touching conversations between prosecutor and accused up to the time of the signing of the document, the court makes the statement that "in the conversation between Dix and Kent, if the testimony of the former is to be believed, nothing transpired in the way of an inducement or a promise in order to secure Kent's signature to the document." But what about a threat? Or does not the Supreme Court of Porto Rico agree with the uniform current of decisions for more than a century, that a statement to an accused by a prosecutor, or any one in authority over him, that they have ample proof to convict him, is a threat? And what about the promise Dix himself admitted he had made in previous conversations? The court had, only two or three sentences further up in the

opinion, referred to these conversations, which shows that it had them in mind; but it apparently did not have in mind the promise made in those conversations, or it was oblivious of the legal principle that the influence of such a promise is presumed to continue until it is *shown* to have been removed.

(*B*) At the bottom of page 69 the court is made to say that Dix's testimony was that he presumed Kent signed the letter hoping that Dix would be a little easier on him, but that he did not promise to be so, but that on another occasion he had promised Kent that if he would return the money Dix would not prosecute him. What conclusion is to be drawn where a court in its opinion expressly sets forth facts which according to every decision ever reported renders such a document as the one in question inadmissible, and then calmly says it "does not fall within the inhibitions mentioned"? Either the judges of that court, albeit two of them are Americans and have no excuse for ignorance of the safeguards of human liberty derived from the common law, were incapable of grasping the meaning of the precedents they themselves cited, or they were so blinded by partiality because a high official like the assistant treasurer of Porto Rico was the prosecutor that the rights of the poor defendant received scant consideration at their hands. They had quoted a dozen cases in which it had been held that threats or inducements *of any kind* made confessions inadmissible; they then repeated evidence given by the prosecutor himself which showed the most powerful inducement possible—freedom from prosecution—yet they fail to comprehend the meaning of the words; they close their eyes with a firmness worthy of a better cause and reiterate, "If there ever was a voluntary confession, it is the one contained in this record."

(*C*) The remarkable exhibition of prejudice and partiality goes still further. The court go on to say: "No great

weight can be given to the *unsupported* testimony of the defendant making the confession in such cases." Is it possible the court did not read the record in the case so as to discover that there was in fact very strong testimony supporting the statement of defendant? No, because on the previous page (69) the witness Dexter is referred to. We have already quoted some of the testimony of this witness, given when the document was offered and its admission discussed in the absence of the jury. Subsequently, at the request of defendant, the witness again testified as to the admissibility of this document, and Mr. Dexter made, among others, the following statements, the first of which, on page 31 of the record, is incorrectly printed as containing a negative, but that mistake is corrected by a certificate of the official stenographer and translator of the court on page 85 of the record. Mr. Dexter stated:

> "Kent had related to me the circumstances, and as his attorney I felt that it was absolutely improper to make use of that document against him, because, under the circumstances and facts, it was not voluntary and had been given under the promise that no trial should be had against Kent in this case. On stating substantially this to Mr. Dix, he replied that he had given that promise not to make it public and prosecute the defendant by means of that document. Mr. Dix insisted that some arrangement be made on the part of the accused, Kent, to return to Dix the money defalcated" (page 31).
>
> "As I understood Mr. Dix on that occasion, Mr. Dix expressed himself to the effect that he had given an absolute promise not to make use of that document, but that after having obtained that document he desired to join a condition to the same" (page 32).

Even if the Supreme Court of Porto Rico overlooked this evidence, will this court overlook it in passing upon this question, than which none more important can be submitted to a court? Will this court permit it to be said that there

is one law of personal liberty within the States and another within the Territories or insular possessions, especially where the right claimed depends upon the fifth amendment to the Federal Constitution as admitted by the insular court? Instead of their decision depending upon the unsupported testimony of the defendant, as they alleged, it was the testimony of the prosecutor that was unsupported, while the testimony of the defendant was supported by a witness who was under not only his oath as such witness, but the even higher and more solemn responsibility of a member of the bar and officer of the court, which makes it the very converse of the Oliveria case, which was cited to support the ruling.

(*D*) The Supreme Court of Porto Rico further says (page 70):

> "The letter, although *prepared under the direction* of Dix, was virtually dictated by Kent. * * * Kent was no longer Dix's subordinate in official position. He was free from arrest, in his own house, surrounded by friends, perfectly free to do as he pleased, and no compulsion or persuasion was used to influence him."

Dix says he himself *wrote* the letter (page 22); he says he thought Kent had been discharged as his subordinate (page 24); and he himself testifies that he had used words which *the law* regards as the equivalent of compulsion, namely, that the books of the club would convict defendant in any court.

The only charitable construction which can be put upon the action of the first appellate court, upon this question of admissibility where the evidence was so plain, is that it arrogated to itself the right to put out of consideration all conversations and all circumstances previous to the moment of the signing of the document, and then to construe the circumstances and conversation at the moment of signing most favorably to the government, instead of most favorably to the defendant; and yet such position is absolutely incon-

sistent with the decisions which that court itself cited and quoted from.

We ask this court to correct that injustice, and to do it in such language as will insure against a repetition thereof in any case where life or liberty is involved.

XIV AND XV.

The fourteenth and fifteenth assignments may be considered together because they both involve the denial by the trial court of the request on behalf of defendant that the jury be instructed to acquit. One request was made at the close of The People's case, and the other at the close of all the evidence. As the record in the shape now before the court does not clearly show that the first motion was made exactly at the close of The People's case, and as the second motion at the conclusion of all the evidence was upon practically the same grounds, we will only argue the latter motion.

The grounds of this motion were (Record, page 34) that there was no evidence upon which to base a conviction and no proof of the offense of which the defendant was accused; in technical words, lack of proof of the *corpus delicti*. Of course this term is most familiar in connection with crimes of violence, where the *corpus* may be taken in its literal sense; but the phrase has been well defined by the Supreme Court of Iowa as meaning proof that the crime charged has been actually committed by some one, and includes two elements, viz., first, that a certain result has been produced, and, second, that some one is criminally responsible for that result.

State *vs.* Millmeier, 102 Iowa, 692.

It is also settled that whenever it is left doubtful whether any crime has been committed, no conviction can be had—logically, because it is incumbent upon The People to prove every element of the offense beyond a reasonable doubt. By the best authorities, also, and those especially applicable as representing the source of our criminal law and procedure,

it is held that the *corpus delicti* must be thus proven independent of any confession, even when such confession is properly admitted.

People *vs.* Tapia, 131 Cal., 647.
Isaacs *vs.* U. S., 159 U. S., 487.
Com. *vs.* McKie, 1 Gray, 61.
State *vs.* Scott, 39 Mo., 424.
Lambright *vs.* State, 34 Fla., 564.
Vernon *vs.* United States, 146 Fed. Rep., 121.

If the so-called "confession" be held improperly admitted in evidence, as we confidently believe it will be, there remains no proof of the amount alleged to be embezzled, or, indeed, of any embezzlement, except the opinion of the prosecutor, Dix, who pretended to draw that opinion from books of account which the fiscal prevented from being introduced in evidence. That part of the evidence preserved in the record shows repeated attempts on the part of defendant's counsel to induce or compel the fiscal to introduce those books of account, so that the jury might judge at first hand; but the fiscal seemingly preferred to trust to the testimony of conclusions which the prosecutor had drawn from them. There must be no doubt that the circumstances amount to the commission of a crime; yet a large part of Dix's testimony was consistent with the idea that immediately after the discovery of the alleged shortage was made, and before the prosecutor had taken unwise and hostile advice, he was inclined to regard the shortage as an indebtedness from Kent to him which he had promised to give him thirty days to pay up. A matter of dispute which is at the time of and subsequent to the commission of the act looked upon by all parties as a civil breach of contract cannot thereafter be turned into a crime at the volition of the offended party.

People *vs.* Carillo, 54 Cal., 63.
People *vs.* Gale, 77 Cal., 120.
People *vs.* Wyman, 102 Cal., 552.

Moreover, the change in the animus of the prosecutor, Dix, subsequent to the failure of Kent to make immediate arrangements to repay what he claimed is clearly shown throughout his testimony, and his unreliability is well illustrated by his statement on page 24 (bottom) that he wrote the letter (confession) on the 8th of the month and afterwards changed its date to the 12th, whereas it is otherwise shown conclusively by his own affidavit and that of witness Harry, made at the time of the preliminary examination, that the investigation of the books to see if there was any shortage only began on the 10th; so it would have been impossible for Dix to know the exact amount of a shortage on the 8th and insert it in a letter, unless he himself was responsible for there being a shortage and knew just how much it was (Record, pages 41 and 42).

Said affidavit of Harry, on page 41, shows the method by which they set to work to prove the shortage, and further that such a shortage went very far from proving a crime. They put down the money received from various sources as shown by the books, and then against that put the amounts paid out as shown by the written receipts preserved. Many of such receipts may have been lost, or money paid without the precaution of taking receipts, or Dix himself may have concealed receipts which he himself had, and it could hardly be contended that Kent performed *all* the duties of treasurer, while Dix never took in or paid out *any* money or took *any* receipts. On the contrary, his own testimony shows that money was taken in by employees at the club, and that tickets which were taken as money were also in circulation there. In such a condition of things, how can this defendant be held responsible for what the books and receipts may have shown? The whole thing smacks very much of persecution instead of prosecution, and without the so-called "confession" there would be not a thread to hang a conviction upon.

Hill *vs.* State, 11 Tex. App., 132.

Moreover, it was not only necessary to prove the commission of the crime, but in embezzlement it is also necessary to prove a specific amount as having been embezzled.

Wharton's Criminal Law, secs. 1030, 1044.
Rex *vs.* Tyers, R. & R., 402.
Rex *vs.* Chapman, 1 Car. & P., 119.
Taylor *vs.* State, 29 Tex. App., 466.
State *vs.* Noland, 111 Mo., 473.

The foregoing reference to the testimony is sufficient to show that no specific sum was proven by any competent evidence.

That the request to instruct was properly made under the practice in Porto Rico is apparent from the provisions of section 257 of the Code of Criminal Procedure, which contains the following:

> "If at any time after the evidence on either side is closed the court deems it insufficient to warrant a conviction, it shall peremptorily instruct the jury to acquit the defendant."

XVI.

The sixteenth error assigned is to a certain paragraph of the charge of the trial judge to the jury in which he attempted to define the crime of embezzlement. This paragraph is found on page 6 of the record. The objection to it is that the reference to and quotation of definitions from non-technical dictionaries, which failed to observe the distinction between larceny and embezzlement, but used words broad enough to cover both, tended to confuse the minds of the jurors—a particularly dangerous thing in a country where the jury system has only recently been implanted—and distract their attention from the real terms of the statute which they were to apply.

XVII AND XVIII.

These two assignments may be considered together because both raise the question of the regularity of the verdict and judgment (Record, page 35). The objection and exception were based upon section 284 of the Code of Criminal Procedure, which says:

> "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

The verdict in this case did not do this (Record, page 4). Therefore the question is, was it necessary? Section 455 of the Penal Code reads in part as follows:

> "Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled," etc.;

and sections 428 and 429 of the same Code define grand and petit larceny respectively, which sections are quoted at length in the opinion of the appellate court below (Record, page 75) and need not be repeated here. These assignments are elaborately discussed in that opinion, and we need do no more than point out wherein we think that discussion departs from the logical conclusion. That court largely bases its conclusion upon the proposition that, as a verdict of "guilty as charged" is sufficient under the California Code to support a conviction upon an indictment for grand larceny, therefore such a verdict is good upon a general information for embezzlement. But it seems to us the difference is that in framing indictments for larceny under that Code it is necessary to describe the crime distinctively as grand or petit, so when the verdict comes in upon such an indictment the jury must have found the larceny of a sufficiently large amount, if the indictment is for grand larceny, to warrant a conviction for grand larceny, because it is to be

presumed the judge will have properly charged them as to the distinction and instructed them, in case they do not find a sufficient amount, to specify in their verdict the lesser crime. But here the charge is not specified as one degree of embezzlement or another; neither was there any reference in the charge of the trial judge to the jury that any distinction was to be made in their verdict based upon the amount they might believe to have been taken. Therefore, if this information would have sustained a verdict of guilty, however small an embezzlement was found to have been committed—and if it is sufficient to convict upon at all it must be sufficient for the smaller as well as the larger amount—we submit that it was impossible for the court to know which section of the larceny statute to apply; but, as in all other features of the case, that section most unfavorable to the defendant was promptly applied, and as promptly sustained by the appellate court, whose argument for such affirmance seems to us more plausible than convincing. They have the generosity to admit a doubt, but foreclose themselves from the exercise of it by saying that the California decisions are binding; then, in order to be bound and relieve themselves of the responsibility which might compel them to favor the contention of the defendant, they eagerly apply decisions which seem to us quite distinguishable, and they do not cite a single case of embezzlement. Had they searched as diligently for applicable as for inapplicable authorities, for those in favor of the defendant as for those against, they would have had little trouble in finding, without going outside the California cases, all the following, and probably various others, to a similar effect:

People *vs.* Coch, 53 Cal., 627.
People *vs.* Baza, 53 Cal., 690.
People *vs.* Salorse, 62 Cal., 139.
People *vs.* Bidleman, 104 Cal., 608.
People *vs.* Wickham, 116 Cal., 384.

In several of the foregoing cases it also appears that the verdicts were so framed as to specify the amount which defendants were found to have embezzled, so as properly to apply the punishment.

XIX, XX, XXI, XXII, AND XXIV.

These five assignments may be considered together, because they all refer to the failure of the trial judge to comply with the provisions of section 266 of the Code of Criminal Procedure, which provides as follows:

> "In charging the jury the court must state to them all matters of law necessary for their information. All instructions given (except such as might incidentally be given during the admission of evidence) shall be oral, unless both parties request the giving of written instructions, or consent thereto. Either party may present to the court any written charge and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must endorse and sign its decision. If part be given and part refused, the court must distinguish, showing by the indorsement what part of the charge was given and what part refused."

We have quoted the whole section, but are concerned with only the first sentence, which requires the court to state to the jury all matters of law necessary for their information. We are well aware of the ordinary rule that a defendant cannot complain of the failure of the judge to instruct upon any particular subject unless his counsel have requested instructions upon that subject; but the above statute seems to change this rule somewhat.

People *vs.* Tapia, 131 Cal., 647.

People *vs.* Byrnes, 30 Cal., 206.

We would not contend that the statutory requirement would apply to unimportant matters, or, if applicable, that failure to comply would constitute ground for reversal; but we think there are some important subjects upon which jurors are ignorant, particularly where the jury system is new, and without instructions from the court the jury will fail entirely to comprehend the nature of the duty they have to perform, and great injustice will result.

For instance, the point included in the nineteenth assignment, that the court did not call the attention of the jury to the limitation of the statute to certain classes of persons and explain who were included in those different classes. Was not this likely to leave the jury with the idea that any one could be convicted whom they might think had converted money to his own use? Take also the subject of the twenty-first assignment, that the evidence should show that the funds alleged to have been embezzled had been confided to defendant by their owner, the Union Club. That necessary restriction would never occur to a jury unless specifically pointed out to them.

And most important of all is the subject of the twenty-second assignment, that the court failed to explain to the jury that the confession which had been provisionally admitted to their consideration was still subject to be cast aside by them, notwithstanding his ruling in admitting it, in case *they* should believe upon the evidence they had heard that it had not been freely made or had been induced by promises or threats. The jury were left entirely in ignorance as to the proper steps to take in approaching the consideration of this evidence, the court simply saying:

> "The court has thought that this document should be submitted to your consideration, and that document is submitted to you, and you will place upon it its proper value, as you have been heretofore charged, taking into consideration all the evidence produced in regard to it" (Record, page 6, bottom).

No information or suggestion to them that they might, in any event, discard the document entirely, but a clear instruction that it was before them for all purposes, and they must place upon it "its proper value"—but some value, at least. Such is not the procedure which has received the approval of this court.

Wilson *vs.* United States, 162 U. S., 624.
Burton *vs.* State (Ala.), 18 So. Rep., 284.

The failure to follow this procedure could not but be highly prejudicial to the interest of the defendant, as was recognized by the first appellate court in its opinion; but that court in direct opposition to what the record shows, persists in its bias in claiming and holding that what was done "practically amounts to such instruction" (page 69).

On the contrary, with the document in question admitted as a "confession," placed before the jury as evidence proper and necessary for their consideration, without any enlightenment as to the other elements necessary to be found before the crime of embezzlement was proven, and without any reference to the right of defendant to be given the benefit when one construction of circumstances was as probable as another, it is not to be wondered at that the jury saw no other course before them but to return a verdict of guilty—a result which could only have become possible by the wrongful and inexcusable admission in evidence of this "confession."

XXIII AND XXV.

The twenty-third error assigned is to that part of the opinion and decision of the Supreme Court of Porto Rico which holds as a legal principle that the fifth amendment to the Constitution "is the foundation of all laws and the basis of all judicial decisions guarding the rights of the accused in the admission of confessions to be used against him in a

trial for crime. * * * Compulsion is the key of the prohibition. If there is no compulsion the confession does not fall within this constitutional inhibition." The twenty-fifth assignment is that the same court did not hold, according to its own recital of the evidence, that the so-called "confession" was brought within the principles of the decisions cited in its own opinion, and therefore should have been excluded.

The above-quoted language of the court, found on page 59 of the record, appears to indicate that the mind of the court was open to only one kind of influence as excluding a confession—that of fear—and was closed to every other—in fact, was oblivious of the language, to say nothing of the significance, of the decisions of this court from which they themselves quoted, as, for example, the language of the Wilson case, on page 64, "freely, voluntarily, and without compulsion or inducement;" or that of the Hopt case, on page 65, "in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused deprives him of that freedom of will essential," etc. Considering these inconsistencies, is not any reasonable man forced to the conclusion that there was also some influence "operating upon the fears or hopes of" that court which rendered it incapable of disposing of these questions with justice and fairness?

The language of the court above quoted with reference to the fifth amendment as the foundation of the right to have confessions not voluntary excluded from the jury is also unhappy and, to say the least of it, inaccurate, showing ignorance of the history of our law and a lack of comprehension of the fundamentals of the subject under discussion. The fact is the very converse of the statement of the court. Instead of the fifth amendment being "the foundation of all laws and the basis of all judicial decisions" relating to confessions, the common law, as well settled long before there

was a Constitution, was the foundation of the amendment and the latter merely declaratory thereof. The court need have gone no farther than the Bram case, 168 U. S., which it cited, but evidently did not entirely read, to have found the clearest possible exposition of the whole matter. On page 543 Justice White said:

> "A brief consideration of the reasons which gave rise to the adoption of the 5th amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystallization of the doctrine as to confessions, well settled when the amendment was adopted, and since expressed in the text-writers and expounded by the adjudications, and hence that the statements on the subject by the text-writers and adjudications but formulate the conceptions and commands of the amendment itself. In Boyd *vs.* United States, 116 U. S., 616, attention was called to the intimate relation existing between the provision of the 5th amendment securing one accused against being compelled to testify against himself, and those of the 4th amendment protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by . ans of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

And again, on page 545:

> "There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes."

Moreover, we submit that it might also have been there said that the old principle of the common law was broader even than the provisions of the amendment, because it went to the extent of protecting in case of confessions "obtained by any direct or implied promise, however slight, or by the exertion of any improper influence."

XXVI.

The assignment numbered 26 has already been covered by the argument upon others involving the admissibility of the "confession."

While the testimony of Dix, Harry, Dexter, and Kent is severally summarized in the opinion of the Supreme Court on pages 59 to 61, inclusive of the record, the court, after its masterly review and evasion of the legal precedents, apparently forgets the existence of any testimony on the subject except that of Dix and Kent, considers that testimony alone, states that the testimony of Kent is unsupported, and hence, he being a defendant and not entitled to belief, is to be rejected and that of Dix taken as the gospel of the matter (Record, page 70, first paragraph); and indeed that very course was necessary if the court was seeking the most plausible method of arriving at a predetermined goal. But is it the proper course for an impartial court to take, or is it one upon which this court will place the seal of its approval? We believe not, because we believe that this court, in a case affecting the liberty of any human being who seeks justice at its hands, will look through the forms and technicalities to the substance; will reach its strong arm from the continent to the insignificant and neglected isle, from the States to the dependency, and will say that this defendant now appealing to the justice and wisdom of this high tribunal, has not had the benefit of a trial according to the laws of the land, or a review thereof by a fair and impartial appellate tribunal.

XXVII.

We therefore confidently submit, in view of the various errors urged upon your consideration and of all the facts and circumstances appearing from the record now before you, that the judgments of the inferior courts should be reversed and this defendant be allowed the opportunity of a trial according to the rules and principles of the law.

Respectfully submitted,

N. B. K. PETTINGILL,
NEMESIO PEREZ MORIS,
HARRY P. LEAKE,
Attorneys for the Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 31.

JAMES E. KENT, PLAINTIFF IN ERROR,

vs.

PEOPLE OF PORTO RICO, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF PORTO RICO.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Upon inspection of the brief filed herein on the 24th day of April last, on behalf of the defendant in error, certain propositions appear to have been advanced with which counsel for plaintiff in error cannot agree and the fallacy of which it seems advisable to expose with some particularity.

I.

The first proposition advanced in the brief of the Attorney General of Porto Rico is by way of suggestion that an irregularity occurred in the suing out of the writ of error, in that, an appeal having been first applied for and bail fixed and given pending that application, a new order for bail should have been made after the application for the writ of error was allowed. But this seems not only unduly technical, but illogical. In criminal cases the admitting to bail has noth-

ing to do with the proceedings in error or appeal, as the case may be. The petition for and allowance of the writ of error acts as a stay of execution; but whether the convicted party shall remain in confinement or not is a matter addressed, in the first instance, to the discretion of the court to which the writ of error is sued out.

In re Claasen, 140 U. S., 200.

The only purpose of requiring a bail bond is to secure the appearance of the accused after the appellate proceedings are ended, and his compliance with whatever may be the judgment of the court of last resort; and if the court will inspect the conditions of the bond, as signed by the present plaintiff in error (Record, page 82), it will clearly appear that the obligation stands good for his compliance with the mandate of this court and with the sentence upon him, unless reversed, whatever may be the method of proceeding before this court.

It is not an unusual practice both to sue out a writ of error and take an appeal in cases where counsel are in doubt as to which is the correct procedure.

Bucklin *vs.* United States, 159 U. S., 680, 682.

In the present case the appeal was taken while plaintiff was represented by counsel unfamiliar with the distinctions of the American law in that regard, and plaintiff in error should be given the benefit of regarding the appeal and writ of error as applied for and allowed simultaneously as in the above cases. Moreover, if this court thinks such procedure necessary, we hereby ask the court for an order allowing the bond shown in the record, as aforesaid, to apply to the writ of error as well as the appeal.

Hudson *vs.* Parker, 156 U. S., 277, 286.

II.

The next point suggested by the Attorney General of Porto Rico, though he seems at the end of his argument thereof to abandon it, is that no writ of error lies from this court to the Supreme Court of Porto Rico in criminal cases. It should be sufficient in reply to call attention to the language of section 35 of the Civil Government Act, approved April 12, 1900, whereby the Supreme Court of Porto Rico and the District Court of the United States for Porto Rico are placed exactly upon the same basis, so far as the appellate jurisdiction of this court over them is concerned, and to the fact that writs of error to said District Court of the United States have been repeatedly sued out from this court and decided by it upon their merits.

Crowley *vs.* United States, 194 U. S., 461.
Amado *vs.* United States, 195 U. S., 172.
Rodriguez *vs.* United States, 198 U. S., 156.

In the Amado case this court went even further, saying that—

> "The review of the final judgment of the District Court of the United States for Porto Rico is not restricted to those cases in which the Constitution, or a treaty of the United States, or an act of Congress, is brought in question and the right claimed under it denied. This construction is too narrow and technical" (page 175).

The cases cited to the proposition that this court has no jurisdiction on writ of error in criminal cases from a Territory were all decided in view of the special provisions of the act of Congress of March 3, 1885, and the reason for such decision was explained in Farnsworth *vs.* Montana, cited by the Attorney General. Those decisions, therefore, can in no way be applicable as against the more recent decisions above cited, where the same act was construed under which the present writ of error was sued out.

III.

The next proposition asserted by the Attorney General, and the one by far most important, is that, conceding the right of plaintiff in error to a review of his case by this court, such review must be limited to the questions of the character which gives jurisdiction to the court—that is, to those questions "where the Constitution of the United States or a treaty thereof, or an act of Congress is brought in question, and the right claimed thereunder is denied," usually designated, as by counsel, Federal questions.

This proposition we controvert, and shall endeavor to show that the argument by which the Attorney General arrives at that conclusion is based upon a wrong premise. We have no inclination to dispute the statement of counsel that "this court cannot review the judgment of the highest court of a State in respect to the construction of local laws when no Federal question is involved." But we submit that the extent of the jurisdiction of this court upon writs of error to State courts is a very different thing from what it may be upon the present writ. The reasoning which limits this court to the consideration of the Federal question in cases coming from State courts was exhaustively discussed and explained in Murdock *vs.* Memphis, 20 Wall., 590, and in the course of that opinion the court calls attention to how "very careful is the statute, both of 1789 and of 1867, to narrow, to limit and define the jurisdiction which this court exercises over the judgments of the State courts" (page 626). This is clearly logical, because the State courts represent a sovereignty independent within its proper sphere, and their decisions upon construction of local statutes and other local matters are regarded as binding upon this court. But not so with those courts subject to the control of Congress under the Constitution, whether they are the inferior Federal courts or the territorial courts. In the construction of statutes regulating appellate jurisdiction from those courts, this court has uniformly held that, where the language of the statute

did not expressly limit the extent of the reviewing power, the whole case was open to review:

Horner *vs.* United States, 143 U. S., 570.
Chappel *vs.* United States, 160 U. S., 499.
Scott *vs.* Donald, 165 U. S., 58.
Holder *vs.* Aultman, 169 U. S., 88.
Burton *vs.* United States, 196 U. S., 283, 295.

And in the last cited case the court goes to the extent of saying that, as it has jurisdiction generally, it will preferably consider other errors before those involving constitutional questions (page last noted).

We therefore feel confident that this court will hold the case generally subject to its reviewing power under the writ of error. But whether so or not, counsel for defendant in error admits that there are three important assignments involving Federal questions, to wit, the plea in abatement, the admission of the so-called "confession" in evidence, and the failure of the trial judge properly to instruct the jury as to the effect of such "confession."

IV.

The argument of counsel attempting to show an analogy between the present writ of error and writs to State courts leads him into further error upon the proposition that this court is bound by the construction given to local statutes by the Supreme Court of a Territory, to support which he cites Sweeney *vs.* Lommie, 22 Wall., 208. A perusal of that case will show that it merely decided, in respect to a matter of local *practice*, that where decisions in other jurisdictions were conflicting under identical codes, this court would not disturb the conclusion of the local courts unless clearly erroneous.

But that a statement that the construction given a local statute by a territorial court is conclusive upon this court is erroneous, see—

No. Pac. R. R. Co. *vs.* Hambly, 154 U. S., 349, 361.
Fox *vs.* Haarstick, 156 U. S., 679.

V.

Counsel further contends that the issue made by the plea in abatement of plaintiff in error, touching the legality of the court which tried him, has been already passed upon by this court in the case of Dones *vs.* Urrutia, warden, 202 U. S., 614. This contention was touched upon in our main brief, but we beg the indulgence of the court to add a word in light of the claim of counsel that in that case *our* contention was "passed upon by this court and resolved against the contention of plaintiff in error."

In the first place, the Dones case was an appeal from the denial of a *habeas corpus,* and, as we understand from the reference by this court in its memorandum opinion to the case of *Ex parte* Ward, 173 U. S., was disposed of here largely upon the proposition that such a question was not open to a petitioner in *habeas corpus.*

But, in the second place, even could it have been considered open, what the court decides is not to be determined by a consideration of the questions discussed in the brief on behalf of *appellee,* but rather upon the grounds taken on behalf of *appellant,* as the court is not obliged to consider anything outside of appellant's contentions—and we feel very sure that the arguments advanced in our main brief were not presented to this court on behalf of Dones, although we have not examined the brief filed in his behalf.

VI.

The last contention of counsel for defendant in error requiring notice refers to the admission in evidence of the so-called "confession," and advances the proposition that such admission should be regarded as harmless error because there was certain oral testimony which in the opinion of counsel *might* have been sufficient to convince a jury of defendant's guilt. .

This advances a new theory, which is in effect that the admission of improper evidence is harmless unless it is the

only evidence upon the point to which it relates As applied to the particular circumstances, it means that a jury will be presumed to have been ready to give the same weight to the unsupported oral statement of the chief prosecuting witness touching a conversation with the accused as was given to a written statement signed by the accused and claimed to have been voluntarily made by him; and it further means that the presumption is that one item of material testimony, improperly admitted, is harmless, provided there are other items of the same kind, however weak in probative force.

That the law is otherwise seems hardly to require citation, but we take the liberty of referring to a few of the decisions of this court upon the point:

Gilmer *vs.* Higley, 110 U. S., 47.
Vicksburg, etc., Co. *vs.* O'Brien, 119 U. S., 99.
B. & A. R. R. Co. *vs.* O'Reilly, 158 U. S., 334.

VII.

We therefore again urge that for the many and serious errors committed in the trial of this cause, and remaining uncorrected by the judgment of the Supreme Court of Porto Rico, that judgment should be reversed and the cause remanded for proceedings consonant with law and justice.

Respectfully submitted,

N. B. K. Pettingill,
Nemesio Perez Moris,
Harry P. Leake,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

JAMES E. KENT, *Plaintiff in Error,* vs. **THE PEOPLE OF PORTO RICO,** *Defendant in Error.*	No. 291.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error was tried and convicted in the District Court of San Juan, Porto Rico, and sentenced to a term of three years in the penitentiary upon an information charging him with the crime of embezzlement. He appealed to the Supreme Court of Porto Rico, and there the judgment of the trial court was affirmed on the 5th day of March, 1906, and thereafter on the same day he gave notice of appeal to the Supreme Court of the United States.

The appeal was allowed by the Supreme Court of Porto Rico, and the appellant, now plaintiff in error, was required to give a bond in the sum of two thousand dollars in order to be placed at liberty pending the appeal. He deposited the sum of two thousand dollars in the Registry of the Court with a bond conditioned as required by law.

The appeal has not been prosecuted, but, in lieu thereof, the plaintiff in error has brought the case to this court for review on writ of error. No security has been given by him other than the appeal bond above mentioned. The writ of error was doubtless obtained and the appeal not prosecuted by reason of the fact that the cause was tried by a jury in the district court, and, under those circumstances, a writ of error, and not an appeal, was the proper remedy.

The plaintiff in error has presented twenty-seven assignments of error to the rulings of the trial court. Many of them involve questions of local practice. The federal questions, if any, contained in the record are urged to the action of the trial court in overruling the plea in abatement and in admitting in evidence the written confession of the accused, and to the court's instructions to the jury on that confession.

The case is before this court under the provisions of section 35 of an act of Congress entitled: "An act temporarily to provide revenue and a civil government for Porto Rico", approved April 12th, 1900, and known as the Foraker Act. That act authorizes writs of error and appeals from the Supreme Court of Porto Rico to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the Supreme Courts of the territories of the United States, and in all cases where the Constitution of the United States or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied. This court has held that it has no jurisdiction on writ of error in criminal cases from a territory.

United States vs. Sanges, 144, U. S. p 310.
Farnsworth vs. Montana, 129, U. S. p 104.
Cross vs. United States, 145, U. S. p 574.
Chapman vs. United States, 164, U. S. p 448.

An that conclusion was reached, notwithstanding the act of

March 3rd, 1885, Chap. 355, Section 2 (23 Statutes at Large, page 443) authorizes a writ of error from this court to the Supreme Court of any territory in any case "in which is drawn in question, the validity of a treaty or statute of, or an authority exercised under the United States." The effect of the decisions is to hold that section 2 of the act is limited in its application to civil cases by the terms of section 1 of the same act. So that there is nothing in the law governing appeals and writs of error from the territorial Supreme Courts to this court, which permits the writ of error in this case, and, if at all, it can be authorized only by virtue of the provision of section 35 of the Foraker Act, which provides for appeal and writs of error in all cases where the Constitution of the United States or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied. But we suggest that the authority so conferred on this court to review the decisions of the Supreme Court of Porto Rico in criminal cases is limited to the federal questions presented. In a civil case in which the amount in controversy exceeds five thousand, this court doubtless could review all the rulings of the trial court assigned as erroneous, but not so in a criminal case. It stands on an equal footing with the civil cases in which the amount in controversy does not exceed five thousand dollars. In such cases we submit that the reviewing powers of this court are the same as it exercises over the decisions of the state courts and no more.

It has been held by a long line of decisions that this court cannot review the judgment of the highest court of a state in respect to the construction of local laws when no Federal question is involved; when the decision of the local court turns on the construction, not the validity of a state law, and the question of the validity is not raised. As stated in *Commercial Bank vs. Buckingham*, 5 Howard, page 317, the power of this court is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary. And we submit that the intent of the

law authorizing writs of error from this court to the Supreme Court of Porto Rico in criminal cases, is to limit the power of review to those matters only which involve Federal questions to the same extent, and in the same manner as in cases from the Supreme Courts of the respective states. And the rule that the construction given to a local statute by the highest court of a state will be followed by this court has also been applied to cases appealed from the Supreme Court of a territory. *Sweeney* vs. *Lommie*, 22 Wallace, page 208. Should this court decide that its power to review extends to all of the assignments of errors presented by the plaintiff in error, then we would respectfully submit for the consideration of the court the opinion of Justice McLeary, appearing on pages 44 to 78 inclusive, of the record, where the objections urged to the rulings and action of the trial court are fully and exhaustively discussed and overruled.

The second assignment of error presented by plaintiff in error goes to the ruling of the trial court in overruling his plea in abatement.

The plea in abatement was based, on the ground that the trial court as organized was not in accordance with the Act of Congress of April 12th, 1900, known as the Foraker Act, which, it is contended, requires that the district courts of Porto Rico be constituted with three judges, as prescribed by the General Order, No. 118, issued by the Military Government in Porto Rico, and that the organization of those courts with one judge only under the Judiciary Act of the Legislative Assembly, 1904, is in contravention of the Act of Congress, and on the ground that the defendant, now the plaintiff in error, being a citizen of the United States, was entitled to the privilege of a trial upon the indictment of a grand jury, and that his trial by information of the prosecuting attorney deprived him of his right as such citizen. See record pages 12 and 13.

The objection to the jurisdiction of the district court presents a question which has already been passed upon by this court and resolved against the contention of plaintiff in error. *Francisco Dones appellant vs. José Urrutia*, Warden of the Penitentiary of Porto Rico, 202 U. S., page 614. We respectfully refer the court to the brief filed in that case on behalf of the apellee, where the question of the validity of the organization of the district courts of Porto Rico is fully discussed.

The other ground we do not believe deserves any serious consideration. The mere fact that the plaintiff in error is a citizen of the United States does not entitle him to be tried upon the indictment of a grand jury, when the laws of Porto Rico do not provide for such procedure. And certainly the ground as stated does not show that any right under a Federal law was claimed by him and his right thereunder denied.

If the purpose of the plea was to claim for the defendant the right to trial upon an indictment of a grand jury, we submit that his plea is without merit.

The grand jury system was unknown to the laws of Porto Rico during the existence of the Spanish sovereingty in the island, and after Porto Rico came under the sovereignty of the United States, and a civil government thereunder was created for it, the Spanish system of criminal law, except as modified by the General Orders of the American Military Government, was continued in force. Section 8 of an Act of Congress, entitled: "An Act temporarily to provide revenues and a civil government for Porto Rico and for other purposes." Approved April 12th, 1906. No grand jury system was established by our Military Government for the insular courts, and therefore none exists today. We believe that the cases of *Hurtado vs. California*, 110, U. S. page 516, and *Hawaii vs. Mankichi*, 190, U. S. page 197, are controlling of this question, and that under their authority the action of the trial court must be sustained. We would suggest that in the case at bar, we are fortified in our position by the fact that the organic law, by which a civil

government of Porto Rico was created, not only failed to extend the grand jury system to the insular courts, but expressly continued in force the criminal laws of the island as they then existed, without any provision for grand juries for those courts. And the action of Congress in that respect was equivalent to an exclusion of the grand jury procedure from the insular courts until such time as the people of the island through their representatives in the Assembly deemed it wise to introduce it.

The plaintiff in error, in support of his plea in abatement, also says that the trial court was without jurisdiction over him, because the judiciary act of March 10th, 1904, did not vest the court with any jurisdiction over his person or over the person of any other defendant who might be brought before said court. We take it that this objection is based on the ground that the court, as organized under the act of July 1st, 1904, is unauthorized by the Foraker law, and the objection is substantially the same those set out in the other grounds of the plea in abatement.

If it should be contended by plaintiff in error that the Judiciary Act of July 1st, 1904, does not confer criminal jurisdiction on the district court, we would then suggest that he has mistaken the intent and meaning of the Act. It was enacted for the purpose of increasing the number of district courts from five, as they existed under General Order No. 118, to seven, and to constitute them with one judge only, instead of three, and, therefore, the jurisdiction of the district courts, except in some details, set forth in the act, remained the same as under the said General Order and the laws of the Legislative Assembly of Porto Rico. Jurisdiction in felony cases is conferred on the district courts of Porto Rico by the Code of Criminal Procedure of 1902.

The assignment of error urged to the ruling of the trial court, in admitting in evidence the letter addressed by the defendant, now plaintiff in error, to the witness Dix, designated as a confession,

seems to be based upon the 5th amendment to the Constitution, which protects the accused from being compelled to give evidence against himself. Whether the 5th amendment of the Constitution is applicables to Porto Rico or not, it will not be necessary for us to discuss. We concede that no person accused of crime should be compelled to give evidence against himself anywhere within the dominion of the United States, and if the plaintiff in error has been deprived of the protection of that principie in this case, we believe the verdict and judgment of the trial court should be reversed.

This question received careful consideration from the Supreme Court of Porto Rico, and the conclusion was there reached that the rights of the accused where in no manner infringed by the admission of the letter in question. In addition to the reasons given by the Supreme Court on the matter of the admission of the letter, we would suggest that the burden is upon the plaintiff in error, to show that he had been materially prejudiced by the action of the trial court. There is no statement of facts in the record, and the only evidence found therein is contained in the bill of exceptions, which of course does not pretend to set forth all of the evidence presented to the jury.

The laws of Porto Rico provide that no judgment in a criminal case shall be reversed by the Supreme Court, except for error appearing in the record, duly excepted to and calculated to injure the rights of the defendant. "An act relative to the reversal of judgments in criminal cases by the Supreme Court, and to amend section 145 of the Code of Criminal Procedure, and to repeal all laws in conflict therewith." Approved May 30, 1904.

It is not made to appear that the admission of the letter was calculated to injure the rights of the accused, as, independent of the letter, there may have been evidence amply sufficient to authorize his conviction, and in the absence of a statement of fact, this court would presume everything in favor of the judgment, even to the extent of assuming that such other evidence was in fact presented. But an examinattion of the plaintiff's bill of exceptions shows that

there was other evidence which we submit was sufficient to establish the confession.

The bill of exceptions contains the following evidence which, independently of the letter, is sufficient to sustain the verdict and judgment:

"9. Thereupon the witness being asked, 'Explain what "occurred between you and Mr. Kent.' The defendant objected "on the ground that the witness was incompetent to testify "what occurred between him and the accused, which objection "being overruled, the defendant duly excepted.

"Thereupon the witness testified, 'That on Monday follow- "ing the Saturday in question, I asked Mr. Kent if he had the "books ready,' and he answered me, 'no.' To which statement "the defendant objected on the ground that the witness was "incompetent to testify to conversation between the witness "and accused, which objection being overruled the defendant "excepted.

"Thereupon the witness testified, word for word, as to the "conversation had with the accused in the following manner:

"My God!" Mr. Kent, "What have you done with that "money?"

"I cannot tell, sir."

"You have used it frivolously?"

"I cannot tell you."

"Mr. Kent, you know I have to replace that money, where "have you spent it, or where have you lent that money, so "that we may put hands on it again?"

"You know that I have no money with which to replace it."

"Tell me where."

"I cannot tell you, sir, except as to $300 which I lent to a "friend in New York."

"Mr. Kent, can you obtain that money?"

"If you will give me time to write, I can obtain it."

"Mr. Kent, where can you get more money to replace this "money you have used?"

"I have friends and relatives in the United States; if I am

"given time to write them, I may also be able to obtain some-
"thing from them. They will do everything possible to replace
"this money appropriated."

"The defendant objected on the ground that it was impos-
"sible for the witness to testify word for word as to conversation
"had six months before."

"Thereupon the witness continued to testify as to conversation
"had between himself and the accussed, and the defendant
"here repeated his objection, which objections were overruled
"and the accused duly accepted." Record page 17.

This evidence, we suggest, is a full and free confession of the crime, and no objection was urged by the accused to its admissability on the ground that it was involuntary. The objections that were urged are without merit and do not go to the point raised in the assignment, that the confession was involuntary. What was said by the parties in the continued conversation, the record does not inform us, except inferentially that it was upon the same subject of the confession. So that if we eliminate the letter, the evidence of his confession is amply sufficient to sustain the verdict of the jury. The evidence of the witness Dix also shows that although the letter was written by him, yet it embodied practically what was said to him by Kent in the conversation above referred to. Under those circumstances, we submit that the confession could have been properly treated as a voluntary one. But the court in its desire to protect the interests of the accussed, submitted the issue as to whether the confession was a voluntary one or not to the jury, and that issue was resolved against the accused.

The plaintiff in error also presents several asignments of errors, which go to the action of the court in its instructions to the jury; among other things for its failure, as claimed by the plaintiff in error, to properly charge the law upon the effect of the written confession of the accused.

This question also received the serious consideration of the

Supreme Court in the opinion of Justice McLeary, as well as in the concurring opinion of Justice Wolfe. Section 266 of the Code of Criminal Procedure of Porto Rico, provides that the court, in charging the jury, must state to them all matters necessary for their information, and that all instructions given (except such as might incidentally be given during the admission of the evidence) shall be oral, unless both parties request the giving of written instructions and consent thereto; and that either party may present to the court any written charge, with a request that it be given. The accused failed to do this, and permitted the general charge, as given by the court, to go to the jury without duly excepting thereto.

The bill of exceptions, page 34 of the record, states that the defendant by his attorneys excepted to the charge as given, and especially to that part which refers to what is embraced and contained in the law defining the crime of embezzlement. We suggest that the exception is entirely too general, and is not sufficient to satisfy the requirements of the act of May 30, 1904, above mentioned, which requires the error of a trial court to be duly excepted to. The exception taken only goes to that part of the charge defining the crime of embezzlement, but is not sufficiently specific to reach any other portion of it, and therefore the question is not properly before this court upon the assignment, unless the action of the trial court constitutes fundamental error. The trial judge did refer to the written confession, and instructed the jury to consider it and the circumstances under which it was submitted to them for their consideration, and directed them to consider it in the light of all the evidence produced in regard to it, so that they might place the proper value upon it, and also charged them upon the doctrine of a reasonable doubt. In view of the fact that the accused failed to ask for any special charges regarding the effect of the written confession, as well as to specifically call to the court's attention, the law relating to voluntary confessions, it is too late for him to urge before this court that error was committed, in not presenting to the jury all of the law upon the point at issue.

As already stated, we believe that the remaining questions presented by the assignments of error are matters of local practice purely, and we do not believe they are subject to review by this court, and if they are, then we repeat that they have received full consideration in the opinion of the Supreme Courts of Porto Rico, which makes it unnecessary for us to go into a discussion of them. We again respectfully refer the court to that opinion in reply to any arguments that may be advanced by the plaintiff in error. We have no copy of his brief.

We respectfully ask that the judgment of the Supreme Court of Porto Rico be in all things affirmed, with costs against the plaintiff in error.

FRANK FEUILLE,
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For the People of Porto Rico,
Defendant in Error.